Supreme Court, U. S.
FILED
AUG 11 1980
MICHAEL RODAK, JR., CLERK

No 80-202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August 11, 1980

QUESTION PRESENTED FOR REVIEW

The Truth-in-Lending Act does not apply to "credit transactions involving extensions of credit for business or commercial purposes," § 104(1), 15 U.S.C. § 1603(1) (1976). Should credit extended for business or commercial purposes become subject to the Act solely because an individual, following customary business practice, may also be liable for the business debt.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner American Express Company ("American Express") respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered April 7, 1980.

OPINION BELOW

The Opinion and Judgment of The Court of Appeals reversing the District Court's judgment in favor of Petitioner appears in Appendix A to this Petition, and is reported at 615 F.2d 191. The Order of the Court of Appeals denying a Petition for Rehearing en banc appears in Appendix B. The Memorandum Opinion and Order of the District Court appears in Appendix C, and is reported at 444 F. Supp. 334. The Judgment of the District Court appears in Appendix D.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Court of Appeals was entered on April 7, 1980. A timely petition for rehearing en banc was denied on May 12, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES, REGULATION, AND INTERPRETIVE LETTERS INVOLVED IN THE CASE

The statutory provisions involved are sections 104(1) and 161 of the Truth-in-Lending Act, 15 U.S.C. §§ 1603(1) and 1666 (1976) (Appendix E). The regulation involved is a provision of the Federal Reserve Board's Regulation Z, 12 C.F.R. § 226.3(a) (1980) (Appendix F). This case also involves several Public Information Letters of the Federal Reserve Board (Appendix G).

STATEMENT OF THE CASE

This case concerns the relationship between the Truth-in-Lending Act and a standard practice commonly utilized in commercial credit transactions: an individual's assumption of liability for a business debt. Because the Act was designed to protect consumers who obtain credit for personal purposes, it contains a broad exemption for business credit transactions. *See* § 104(1), 15 U.S.C. § 1603(1) (1976). The decision below holds that this exemption is nullified whenever an individual is personally liable for a business debt. The Truth-in-Lending Act contains an extensive and complicated array of regulatory requirements (including those relating to disclosure, resolution of billing errors and advertising) which were not designed for and are not easily applicable in a commercial context. Because it is common for individuals to assume personal liability for business debts, especially in situations involving loans to unincorporated companies or small corporations, the Court of Appeals' decision

threatens to disrupt a broad range of commercial practices and make credit more difficult to obtain for certain business borrowers.

The facts giving rise to the litigation can be summarized briefly. A company called John E. Koerner & Co., Inc. ("the company") applied for an American Express Card on November 16, 1965. (App. C at 2c-3c.) On the same day, the company requested that company cards be issued to several employees, including Louis R. Koerner, Sr., ("Koerner"), Respondent here. For Koerner's card, both Koerner and the company signed the "Company Account" request form. By signing, Koerner agreed to be jointly and severally liable, along with the company, for all charges incurred through use of the company card issued to him. (App. A at 2a.) The company's application was approved and cards were issued to Koerner and other employees. (App. A at 2a; App. C at 3c.) All charges for use of Koerner's card, as well as the other company cards, were billed to the company at its business address on one statement. The statement showed sub-totals for each card, including the card used by Koerner. (App. A at 2a; App C at 3c.)

In 1975 a dispute arose between Koerner and American Express over the billing of certain charges. (App. A at 3a.) The parties agree that these charges were incurred for business purposes. (App. A at 3a.) The dispute had not been resolved on September 28, 1976, when Koerner attempted to use his card at New Orleans International Airport to purchase an airline ticket for a business trip. (App. A at 3a; App. C at 4c.) The ticket salesman called American Express to check the status of the account, and then (apparently at American Express' request) returned Koerner's card to him, cut in half. (App. A at 3a; App. C at 4c.)

Koerner brought suit in the United States District Court for the Eastern District of Louisiana, charging that the revocation violated section 161 of the Truth in Lending Act, 15 U.S.C. § 1666 (1976) (a section originally enacted as part of the 1974 Fair Credit Billing Act).[1] Among other things, this section prohibits certain actions by a creditor against a cardholder while the creditor is processing complaints concerning billing errors. Jurisdiction of the District Court over this claim was invoked under 15 U.S.C. § 1640(e) and its counterparts, 28 U.S.C. § 1331 and 1337. Following the recommendation of a magistrate, the District Court granted summary judgment for American Express. It held that § 161 is applicable only to extensions of consumer credit and therefore does not apply to company accounts. (App. C at 8c-9c, 17c.) It based its decision, among other factors, on the language of § 161 itself and on the exemption contained in § 104(1) of the Act for "[c]redit transactions involving extensions of credit for business or commercial purposes." (App. C at 10c, 13c.) On appeal, the Court of Appeals for the Fifth Circuit reversed.

The Court of Appeals recited the holding of the District Court but then determined that it need not resolve the question "whether § 1666 [161 of the Act] covers

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[1] Koerner also alleged that American Express violated § 127 of the Act, 15 U.S.C. § 1637 (1976), which requires certain periodic disclosures. Because Koerner asserts this section "is made applicable to American Express through § 161," his right to assert a violation of § 127 by American Express depends on the applicability of § 161. (App. A at 4a; App. C at 5c.)

In addition, Koerner alleged that American Express violated Louisiana law by committing a tort through its breach of contract. Koerner later stipulated that this claim would not reach the requisite jurisdictional amount. (App. A at 4a; App. C at 2c n.1.)

corporate transactions and transactions for business or commercial purposes." (App. A at 9a.) Instead, it decided the case on a theory not addressed by the trial court or the briefs of either party at either the trial or appellate level. The court held that because an individual is a "consumer," the creditor who accepts an individual's assumption of liability will be subject to the Truth-in-Lending Act:

> Koerner signed a statement joining in the application and assuming joint and several liability for any debts. Therefore, American Express could recover from him or from the company . . . The credit card company cannot have it both ways: If it does not want to be bound by consumer lending requirements, then it should not be allowed to collect its debts from a consumer.

(App. A at 9a-10a) (footnote omitted).

In arriving at this conclusion, the Court of Appeals recognized that it was abandoning the "business purpose" test required by the language of § 104. But it deemed irrelevant the purpose of the credit transaction so long as an individual is liable for the resulting debt:

> Although our decision prevents application of the [§ 104] exemption "for business or commercial purposes" to [§ 161] when an individual is liable for debts incurred, this result is consonant with the purpose of the Fair Credit Billing Act of 1974—protecting consumers from the harassment of creditors. *See* S. Rep. No. 278, 93d Cong., 1st Sess. 1-2, 4-6 (1973); S. Rep. No. 750, 92d Cong., 2d sess. 1-4 (1972).

(App. A at 10a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH ALL RELEVANT PRIOR JUDICIAL INTERPRETATION OF THE "BUSINESS PURPOSE" EXEMPTION, INCLUDING TWO DECISIONS OF THE TENTH CIRCUIT.

The Court of Appeals decided that the Truth-in-Lending Act applies to every extension of credit for which an individual may be liable. The decision is in direct conflict with the conclusions of every other court—including the Tenth Circuit and numerous district courts—that has previously interpreted § 104 in a case involving individual liability. The courts have consistently ruled that credit transactions for business or commercial purposes are exempt from Truth-in-Lending Act requirements regardless of who the debtor might be.[2] The court below

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[2] Two courts have ruled that § 104 does not prevent the application of §§ 132, 133, and 134 of the Act, 15 U.S.C. §§ 1642-44 (1976) (sections not at issue here), to business credit cards. *American Airlines, Inc.* v. *Remis Industries, Inc.*, 494 F.2d 196 (2d Cir. 1974); *Credit Card Service Corp.* v. *FTC*, 495 F.2d 1004 (D.C. Cir. 1974). These rulings—which have since been codified by an amendment to the statute—turned on an interpretation of the particular sections at issue and are readily distinguishable. First, both cases found a conflict between § 104 and the sections at issue. Here, the court below did not resolve the issue "whether [§ 161] covers corporate transactions and transactions for business or commercial purposes." (App. A at 9a.) Thus, it could not have determined that there was a conflict between § 104 and § 161. Moreover, the express language of § 161 shows unambiguously that there is no conflict. *See* pp. 9-10 *infra*. Second, both *American Airlines* and *Remis* confirmed prior administrative interpretation of the sections at issue. Here, the position of the Federal Reserve Board's staff is that the § 104 exemption applies to the part of the Truth in Lending Act which includes § 161. *See* p. 15, *infra*.

did not cite or purport to distinguish any of those prior rulings.

The text of the Truth-in-Lending Act specifically exempts from the scope of the Act "credit transactions involving extensions of credit for business or commercial purposes." § 104(1), 15 U.S.C. § 1603(1) (1976). The exempting language is repeated in the Federal Reserve Board's implementation of the Act, Regulation Z. 12 C.F.R. § 226.3(a) (1980). The courts have previously adhered closely to this statutory and regulatory command. The Tenth Circuit recently reviewed the case law interpreting the provision and noted that "[c]ases considering whether a transaction is primarily consumer or commercial in nature look to the transaction as a whole and the purpose for which credit was extended." *Gallegos* v. *Stokes*, 593 F.2d 372, 375 (10th Cir. 1979). *See also Redhouse* v. *Quality Ford Sales, Inc.*, 511 F.2d 230, 234 (10th Cir. 1975). A recent ruling by another panel of the Fifth Circuit itself is in accord: "The courts will look to the purpose of the loan to determine whether it is covered by the Act." *Poe* v. *First National Bank of DeKalb County*, 597 F.2d 895, 896 (5th Cir. 1979).[3] Numerous district courts have either expressly endorsed[4]

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[3] *Citing Sapenter* v. *Dreyco, Inc.*, 326 F. Supp. 871 (E.D. La.), *aff'd*, 450 F.2d 941 (5th Cir. 1971), *cert. denied*, 406 U.S. 920 (1972); *Tower* v. *Home Constr. Co. of Mobile, Inc.*, 458 F. Supp. 112, 116-17 (S.D. Ala. 1978).

[4] *See, e.g., Weingarten* v. *First Mortgage Co.*, 466 F. Supp. 349, 352 (E.D. Pa. 1979) ("[t]he cases which have been called to this Court's attention appear to hold without exception that where the credit transaction is for a business purpose rather than for a personal, family, household or agricultural purpose, then the transaction is not covered by the Act"); *Tower* v. *Home Constr. Co. of Mobile, Inc.*, 458 F. Supp. 112, 116-17 (S.D. Ala. 1978); *Smith* v. *Chapman*, 436 F. Supp. 58, 61 (W.D. Tex. 1977), *aff'd*, 614 F.2d 968

or implictly applied[5] the same principle.

A review of these cases reveals that no court has ever before found an analysis of a transaction's purpose unnecessary because an individual consumer was liable, even where the individual consumer was arguably less sophisticated in credit transactions than the businessman plaintiff in this case. One of the two Tenth Circuit cases cited above is particularly instructive. There, the Court of Appeals reversed a trial court ruling that the Truth-in-Lending Act applied to the purchase of a pick-up truck by two Navajo Indians. The Court found that summary judgment in favor of the Indians was improper because the trial court had failed to determine whether the truck was to be used for business or for personal purposes. *Redhouse* v. *Quality Ford Sales, Inc.*, 511 F.2d at 234.[6]

(5th cir. 1980); *Puckett* v. *Georgia Homes, Inc.*, 369 F. Supp. 614, 618-20 (D.S.C. 1974); *Adema* v. *Great N. Dev. Co.*, 374 F. Supp. 318, 319-20 (N.D. Ga. 1973); *Brill* v. *Newport Nat'l Bank*, Consumer Credit Guide (CCH) ¶ 99,057 (S.D. N.Y. 1973); *Sapenter* v. *Dreyco, Inc.*, 326 F. Supp. 871, 873-74 (E.D. La.), *aff'd*, 450 F.2d 941 (5th Cir. 1971), *cert. denied*, 406 U.S. 920 (1972).

[5] *See, e.g., Vines* v. *Hodges*, 422 F. Supp. 1292, 1297 (D.D.C. 1976); *Sambolin* v. *Klein Sales Co.*, 422 F. Supp. 625, 627 (S.D.N.Y. 1976); *Kenney* v. *Landis Financial Group, Inc.*, 375 F. Supp. 852, 853 (N.D. Iowa 1974.)

[6] The other Tenth Circuit case also involved the purchase of a pick-up truck. There the court affirmed a trial judge's finding of a personal purpose, following a review of that finding, where the pick-up was to be used primarily for personal transportation and where the plaintiff was "a widow with a fifth grade education, who traded her only car and personal jewelry in on [the] purchase." *Gallegos* v. *Stokes*, 593 F.2d at 375. The Fifth Circuit's *Koerner* analysis would have made the review of the lower court's determination superfluous.

See also Poe v. *First National Bank of DeKalb County*, 597 F.2d at 895.[7]

Instead of relying upon the language of the Truth-in-Lending Act and the precedent interpreting that language, the court below decided the case in accord with its own concept of equity. It held that because an individual is a "consumer", the creditor who chooses to accept an individual's assumption of liability will be subject to the Act without regard to § 104. As its colorful rule of decision, the court announced: "We base our holding primarily on a principle almost as old as flour: You cannot have your cake and eat it too." (App. A at 2a; *see also id.* at 10a.) But the court's adage does not provide a proper rule of decision. Nor is the result supported by the purposes of the Fair Credit Billing Act, cited by the court as an alternative ground for abandoning the business purpose test. If the Court of Appeals had closely examined the background of §§ 104 and 161, as the trial court did (App. C at 8c-17c), it would have found that the language, legislative history, and purposes of the Truth-in-Lending Act as a whole, and the Fair Credit Billing Act in particular, are actually fully consistent with the application of the business credit exemption.

The express language of § 161 shows unambiguously that there is no conflict between that section and § 104.

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[7] *See Tower* v. *Home Constr. Co. of Mobile, Inc.*, 458 F. Supp. 112, 117 (S.D. Ala. 1978) (plaintiff commercially motivated and thus not protected by the Truth-in-Lending Act where she secured credit for repairs to family home to which she intended to retire, but which she had rented out in the interim); *Puckett* v. *Georgia Homes, Inc.*, 369 F. Supp. 614, 619-20 & n.6 (D.S.C. 1974) (barber earning $5,000 a year not within scope of the Truth-in-Lending Act in securing credit to purchase mobile home which he intended to rent).

Section 161 concerns billing errors in a "statement of the obligor's account in connection with an extension of *consumer credit.*" § 161(a), 15 U.S.C. § 1666(a) (1976) (emphasis added). The specific subsection of § 161 applicable to Koerner's claim below governs the closing of an "open-end *consumer credit* plan" where the obligor has given the requisite notice of an alleged billing error. § 161(d), 15 U.S.C. § 1666(d) (1976) (emphasis added). Because the references to consumer credit serve to limit the operation of 161 to non-business transactions,[8] the text of § 161 cannot be read to preclude application of the business credit exemption contained in § 104.

In addition, the legislative history of the 1974 amendments to the Truth-in-Lending Act contained in the Fair Credit Billing Act demonstrates that the "business or commercial purpose" exemption of § 104 was intended to apply to those amendments, which include § 161. The Fair Credit Billing Act was part of a bill that also included a provision excepting from § 104(1) three specific

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[8] The Truth-in-Lending Act provides that:

> [t]he adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and *the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.*

§ 103(h), 15 U.S.C. § 1602(h) (emphasis added).

According to Regulation Z:

> "Consumer credit" means credit offered or extended to a natural person, in which *the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes.* "Consumer loan" is one type of "consumer credit."

12 C.F.R. § 226.2(p) (1980) (emphasis added).

credit card provisions of the Truth-in-Lending Act: those pertaining to issuance of unsolicited cards, limits of liability, and fraud.[9] *See* 15 U.S.C. § 1645. Thus, a vehicle for making exceptions to § 104(1) was readily at hand, and was in fact utilized. Congress' failure to make use of this vehicle with respect to § 161 and the other provisions of the Fair Credit Billing amendments indicates that it intended *not* to except those provisions from the operation of § 104(1). There is also direct evidence in the legislative record that, apart from the specified exceptions, Congress intended § 104(1) to have broad application.[10]

In sum, the Court of Appeals' holding, made without benefit of review by the trial court or briefing by either

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[9] These provisions are codified at 15 U.S.C. § 1642-44 (1976).

[10] The statutory exceptions to § 104 grew out of a recommendation to Congress contained in the Federal Reserve Board's Annual Report for 1972. The Board had previously amended Regulation Z, based on its understanding of the Act, to provide the exceptions now codified at 15 U.S.C. § 1645 (1976). In the 1972 Report, it recommended that the Act be amended to conform with the Regulation and thus to provide expressly what the Board believed was previously implicit. Interpreting the amendments to the Regulation, the Board took the position that the "amendments do not affect the business exemption in its application to the disclosure, rescission and advertising requirements." 119 Cong. Rec. 4595 (1973). *See also* 37 Fed. Reg. 24337, 24339 (1972) (promulgation of amended regulations); 37 Fed. Reg. 16408 (1972) (proposal to promulgate amended regulations). Thus, it intended the statutory amendments to have a similar limited effect. *See* 1972 Annual Report, *supra*, 119 Cong. Rec. at 4597. There is every indication that Congress agreed with the Board, for the Annual Report was included in the record at the time Senator Proxmire introduced the bill incorporating the Board's recommendation. 119 Cong. Rec. 4595 (1973).

party, is without support.[11] It nonetheless exists as a basis for universal abandonment of the well-established business purpose test as a measure of the scope of the Truth-in-Lending Act. Certiorari should be granted to resolve the direct conflict between this new ruling and earlier decisions which treat the purpose of the credit transaction as dispositive under § 104.

II. THE COURT OF APPEALS VIOLATED THE RECENT EXPRESS HOLDING OF THIS COURT IN *FORD MOTOR CREDIT COMPANY* v. *MILHOLLIN* BY DISREGARDING FEDERAL RESERVE BOARD STAFF OPINIONS ESTABLISHING THAT CREDIT TRANSACTIONS FOR BUSINESS OR COMMERCIAL PURPOSES ARE EXEMPT FROM THE TRUTH-IN-LENDING ACT, REGARDLESS OF WHO THE DEBTOR MIGHT BE.

In *Ford Motor Credit Co.* v. *Milhollin*, 100 S. Ct. 790 (1980), this Court held that the courts' "traditional acquiescence in administrative expertise is particularly apt" where the Federal Reserve Board and its staff interpret the Truth-in-Lending Act. *Id.* at 797. "Congress has specifically designated the . . . Board and [its] staff as the primary source for interpretation and appli-

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[11] The court's reliance on the ground that an "individual" or, as it occasionally put it, a "consumer," was liable on the debt would actually make part of § 104(1) meaningless. That section exempts from the scope of the Truth-in-Lending Act extensions of credit "to government or governmental agencies or instrumentalities, or to organizations." 15 U.S.C. § 1603(1) (1976). "Organization" is defined as a "corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association." 15 U.S.C. § 1602(c) (1976). Therefore, as the Act now stands, *only* extensions of debt to "individuals" are within the scope of the Act. The court therefore makes the "business purpose" exemption surplusage, since it would only exempt transactions already exempted by another portion of § 104.

cation of truth in lending law[s]." *Id.*[12] Accordingly, the Court held that where the interpretation of the Act or Regulation Z is at issue,

> [u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive . . . .

Id. Under the *Milhollin* rule, it was the duty of the Court of Appeals to inquire whether there was a rational basis to support applicable rulings of the Federal Reserve Board staff. The Court conducted no such inquiry.

The Federal Reserve Board staff has determined repeatedly that a transaction involving an extension of credit for business or commercial purposes is exempt from the operation of the Truth-in-Lending Act, whether or not an individual is liable for the obligation. In one opinion letter directly on point, the staff ruled that the Truth-in-Lending Act would not apply where a corporation and a corporate employee are jointly and severally liable for obligations incurred on the employee's credit card, issued to the corporation for use by the employee. The staff stated that "[i]f the credit is for business or commercial purposes, it would not be subject to Truth in Lending by virtue of the exemption in § 226.3(a)."[13]

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[12] *See also Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356 (1973).

[13] The staff went on to note that "if the purpose of the credit is mixed but primarily for personal, family, household or agricultural purposes, the credit would be subject to Truth in Lending's provisions. However, we suspect that few cards, if any, which are issued with a corporation as a cardholder would fall within this category." Thus, where an issue arises concerning the purpose for which a corporate employee's

Public Information Letter No. 727, November 13, 1975, issued by Griffith L. Garwood.

Other staff opinions reach identical conclusions. The staff has advised that where a corporation's principal shareholder guarantees a loan made to the corporation for a business purpose, and provides his principal residence as security for the loan, the transaction is exempt from the Truth-in-Lending Act because of the business purpose exemption. Public Information Letter No. 277, March 10, 1970, issued by Kenneth A. Kenyon.[14] The staff has also determined that where credit is extended to an individual who buys securities to supplement his business income as a merchant, the transaction is exempt

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company credit card is used, the staff has determined that it will be deemed used for business or commercial purposes unless it is used "*primarily* for personal, family, household or agricultural purposes."

The staff's position finds support in the statutory definition of "consumer" and the definition of "consumer credit" contained in Regulation Z, both of which define a consumer credit transaction as one *primarily* for "personal, family household, or agricultural purposes." *See* n.8, *supra*. Courts have indicated that transactions falling outside this definition must be business credit transactions exempted from the coverage of the Act. *See, e.g., Smith* v. *Chapman*, 436 F. Supp. 58, 61 (W.D. Tex. 1977); *Tower* v. *Home Constr. Co. of Mobile, Inc.*, 458 F. Supp. 112, 116-17 (S.D. Ala. 1978).

[14] *See also* Public Information Letter No. 751, January 14, 1974, issued by Jerauld C. Kluckman (loan taken by individual exclusively for business purposes is exempt from coverage of the Truth-in-Lending Act, regardless of fact that loan will be secured by private home); Public Information Letter No. 663, January 23, 1973, issued by Jerauld C. Kluckman (loan transaction for commercial purposes is exempt from coverage of the Truth-in-Lending Act, regardless of fact that loan is secured by antiques used for personal, family, or household purposes).

from coverage, even though the only obligor is a natural person. Public Information Letter No. 821, July 18, 1974, issued by Jerauld C. Kluckman.

The Board staff has also specifically ruled that the business purpose exemption is fully applicable to the amendments to the Truth-in-Lending Act contained in the Fair Credit Billing Act. This includes § 161. In a letter cited but ignored below, the staff responded to an inquiry concerning the applicability of the Fair Credit Billing requirements to "cards . . . used by corporate employees to purchase goods or service required for the performance of their job." The staff took the position that "the requirements of Fair Credit Billing do not apply to card issuers in relation to card holders using the cards for business or commercial purposes." Public Information Letter No. 1004, February 10, 1976, issued by D. Edwin Schmelzer.

Under the rule established by this Court in *Milhollin*, positions of the Federal Reserve Board staff should be dispositive, "[u]nless demonstrably irrational," where interpretations of the Truth-in-Lending Act and Regulation Z are at issue. The Board staff has consistently taken the position that credit transactions for a business or commercial purpose are exempt from the coverage of the Act, even if an individual executes or guarantees the loan obligation. It has also determined that this exemption is applicable to that part of the Truth-in-Lending Act which contains § 161. These positions are not irrational, for they find support in the express language and legislative history of the Act and Regulation Z and in the cases interpreting the Act and Regulation.[15]

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[15] The staff's position that credit transactions for a business or commercial purpose are exempt from the coverage of the Truth-in-Lending Act finds support in the express language establishing the exemption, contained in the Act and Regulation Z, *see* p. 7 *supra*, and in the cases cited above

The Court of Appeals cited *Milhollin* and announced that it would give the staff's opinion "great weight." (App. A at 8a.) But it did not purport to analyze the relevant staff opinions or to reject them on the ground that they lacked a rational basis. Instead, it ignored the *Milhollin* test and substituted its own fiat for the Board's well-considered approach.

III. THE DECISION BELOW PRESENTS AN IMPORTANT FEDERAL QUESTION WITH SIGNIFICANT IMPACT ON CREDIT FOR BUSINESS ENTERPRISES.

The Court of Appeals' ruling that a debtor's status as an individual forces application of the Truth-in-Lending Act to commercial credit transactions has serious consequences for business enterprises, particularly small and new businesses.

Frequently, unincorporated businesses can obtain credit only if the individual or individuals running the business assume personal liability for the loan obligation. Even for incorporated businesses, small businesses or new businesses with a limited financial history can often obtain credit in adequate amounts and at acceptable rates of interest only if the individuals behind the corporate facade assume liability for the corporate debt: [16]

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interpreting that language. *See* pp. 7-9, *supra*. The staff's position that the business purpose exemption is applicable to the Fair Credit Billing Act, which includes § 161, is fully supported by the express language of § 161, *see* pp. 9-10 *supra*, and by the legislative history of the Fair Credit Billing Act. *See* pp. 10-11 *supra*.

[16] The guaranty is a particularly common way of structuring the individual's liability for corporate debt:

> A great many bank loans would be unjustified from a credit point of view without the support of a guaranty. As a result, it is common practice for a bank, when mak-

> Before agreeing to make a loan, a bank will often require the added liability of a third party as security for the borrower's performance. This type of transaction is routine whenever the borrower's own financial position fails to justify the loan and whenever, in loans made to corporations, the bank or other lender wishes to obtain the liability of officers or stockholders who, if the corporation should default, would not otherwise be obliged to pay the note.

W. Hawkland, Commercial Paper 92 (2d ed. 1979).

Moreover, the practice of obtaining a personal guarantee or other personal liability has commercial utility beyond the new or weak business enterprise. From the standpoint of the lender, individual liability—whatever its form—functions to improve the security of the business debt. From the standpoint of even a large corporate borrower, the individual's agreement to assume liability acts as a form of constraint upon abuse by that individual or others under his supervision. In these and numerous other ways, the practice of individuals assuming liability in commercial credit transactions affects the availability, cost and desirability of the credit transaction for the business parties.

Under these circumstances, the decision of the Court of Appeals has pernicious effects. The Truth-in-Lending Act and Regulation Z include a detailed regulatory scheme which mandates specific disclosures, provides for rights of rescission, imposes limitations on advertising, and otherwise governs the transactions themselves. If lenders continue to demand individual guarantees or other forms of personal liability, borrowers will be charged the costs of compliance with the Act and Regulation, and the com-

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> ing a loan to a small corporation, to insist on guaranty forms *signed* by individuals—and other corporations—with ownership interest in the borrower.

T. Quinn, Uniform Commercial Code Commentary and Law Digest ¶ 3-416[A][5] (Supp. 1979).

mercial transactions themselves will be needlessly burdened by complicated regulatory requirements not designed for such transactions. If lenders choose to forego the personal liability, this may result in the unavailability of funds, a higher cost to borrowers, or other social costs which business enterprises are unwilling to accept. In either event, the imposition of the Truth-in-Lending requirements upon standard commercial transactions creates new and significant economic constraints.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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August 11, 1980

80-202

No.

Supreme Court, U. S.
FILED
AUG 11 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August 11, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-1290

LOUIS R. KOERNER, SR., Individually and on behalf of all others similary situated,
Plaintiff-Appellant,

v.

THE AMERICAN EXPRESS COMPANY,
Defendant-Appellee.

April 7, 1980

Rehearing and Rehearing En Banc
Denied May 12, 1980

Louis R. Koerner, Jr., Terry A. Bell, New Orleans, La., for plaintiff-appellant.

Chaffe, McCall, Phillips, Toler & Sarpy, Peter Frank Liberto, Lemle, Kelleher, Kohlmeyer & Matthews, David L. Campbell, New Orleans, La., for defendant-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, GOLDBERG and HENDERSON, Circuit Judges.

WISDOM, Circuit Judge:

This action involves a dispute about the coverage of the credit card provisions of the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.* Section 1666, dealing with correction of billing errors, requires that a credit card issuer take certain steps before restricting or clos-

ing a credit card account. The question this case presents is whether the safeguards of § 1666 apply to an individual cardholder who is jointly and severally liable with his employer for debts charged to the card. The card issuer contends that § 1666 does not apply to transactions of a business or commercial nature and that holders of credit cards issued under a company account do not qualify as consumers. We hold that for a credit card issuer to hold an individual jointly and severally liable with his employer, the issuer must comply with the requirements of § 1666. We base our holding primarily on a principle almost as old as flour: You cannot have your cake and eat it too.

I.

On November 16, 1964, John E. Koerner & Co., flour wholesaler, applied for an American Express Card, using a company account application form. American Express requested bank and credit references only from the company. John E. Koerner, Jr., was designated as the individual authorized to receive a card in the company name. The application was approved.

The same day the plaintiff, Louis R. Koerner (Koerner), a company officer, completed a form labeled "Application for Supplementary Credit Card, Company Account". The form stated that "The undersigned individual and company join in this application and assume *joint and several liability* for all charges incurred prior to return of Credit Card to American Express Company". (Emphasis added.) American Express requested no additional bank or credit references and approved Louis Koerner's application. It approved similar applications submitted by other employees of Koerner & Co.

American Express billed the charges for all of these cards to the company on one statement, showing subtotals for the individuals. Louis R. Koerner used his

card for both personal and business charges, paying for the personal charges himself.

In 1975 a billing dispute arose between Koerner and American Express over the following charges, totalling less than $50:

> (a) Three debits in the amount of $3.00 each and one debit in the amount of either $3.00 or $6.00 for charges made by plaintiff in July, August, September, and October of 1975 for air flight insurance for trips conducted for business purposes.
>
> (b) A debit of $20.00 representing, according to plaintiff, "a charge for Mr. John E. Koerner's card which was returned and for which credit was never given." This, presumably, was a renewal fee for a card no longer desired.
>
> (c) A debit of $20.00, ultimately cancelled by a credit which plaintiff asserts was "a charge for a card of Ralph E. Koerner". The nature of the charge has not been established.

The parties agree that all of these were business charges. The dispute remained unresolved through September 28, 1976, when Koerner attempted to use his card at New Orleans International Airport to pay for an airline ticket for a business trip. The ticket salesman called American Express to check Koerner's status. The salesman handed the telephone to Koerner to speak with American Express, and, after the conversation, gave him back his card. It had been cut in two.

Koerner filed suit in November 1976, contending that American Express violated 15 U.S.C. § 1666 by wrongfully revoking his credit card as a result of a billing dispute; violated 15 U.S.C. § 1637 by not making certain periodic disclosures; and violated Louisiana law by committing a tort through its breach of contract. He

alleged that he represented a class similarly situated. The court did not certify the class. Following the recommendation of a federal magistrate, the trial court granted summary judgment for the defendant on December 8, 1977. *Koerner* v. *American Express Co.*, E.D. La. 1977, 444 F.Supp. 334. The court held that § 1666 was applicable only to credit cards issued to natural persons under a non-corporate account. The court denied the other claims because Koerner had asserted § 1637 was made applicable through § 1666 and because Koerner had stipulated that his state claim would not reach the requisite jurisdictional amount. After the court denied several post-judgment motions, Koerner appealed to this Court.

II.

TILA was enacted on May 29, 1968. The Act then contained no reference to credit card transactions and was intended to provide "a meaningful disclosure of credit terms" to consumers. *Id.* § 1601. It specifically exempted credit transactions for business or commercial purposes, or extension of credit to several types of organizations, including corporations. *Id.* § 1603. In 1970 Congress amended the Act to prevent issuance of unsolicited credit cards, *id.* § 1642, to limit to $50 the liability for unauthorized use of a card, *id.* § 1643, and to provide criminal penalties for fraudulent use of credit cards, *id.* § 1644. It also added several definitional subsections. *Id* §§ 1602(j-o).

After passage of the amendments, two circuit courts decided that the $50 liability limitation applied to corporate transactions despite the exemption in § 1603. *American Airlines, Inc.* v. *Remis Industries, Inc.*, 2 Cir. 1974, 494 F.2d 196, involved $14,008.16 in unauthorized charges on an Air Travel Card. The case was governed by a New York statute that determined liability for unauthorized use according to the limits under TILA. The

court noted that § 1643(a) limited liability of a "cardholder" to $50. A "cardholder" is defined as "any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person". 15 U.S.C. § 1602(m). A "person" is "a natural person or an organization". *Id.* § 1602(d). An "organization" includes a "corporation". *Id.* § 1620(c). The court refused to apply the § 1603 exemption to a corporation because that would raise "a threshold question for which the Act at least provides no ready answer: at what point in the credit card process does a transaction involving the extension of credit occur?" 494 F.2d at 201. One possibility is the time the card was issued. But individuals might obtain a card for business or personal purposes or both. A predominant use test would be "wholly unwieldy" because of "the extensive, overlapping use of some types of credit cards, e.g., to purchase gasoline or meals in a restaurant". *Id.* The other possibility would be that a transaction involving the extension of credit occurs when the card is used. But the unauthorized use of a card is not an extension of credit *to the cardholder*. *Id.* at 201 n. 4. Whether the unauthorized user had a business or personal purpose should not determine whether $50 limits the cardholder's liability.

The court refused to accept American Airline's argument that commercial enterprises have bargaining power that obviates the necessity for statutory protection, reasoning that the use of form contracts for credit card applications makes the process "a take-it-or-leave-it method of contract formulation". *Id.* at 202. Finally, the court cited interpretations by the two administrative bodies concerned with the Act, a Federal Reserve Board regulation, *see* 12 C.F.R. § 226.13(a)(4) (1973) (amended Nov. 2, 1972), *now codified at* § 226.2(m), and

a Federal Trade Commission decision, *In re Credit Card Service Corp. d/b/a Credit Card Service Bureau*, 82 F.T.C. 191, 209-11 (1973), *affirmed and enforced* sub nom. *Credit Card Service Corp.* v. *Federal Trade Commission*, D.C. Cir. 1974, 161 U.S.App.D.C. 424, 495 F.2d 1004. Both agencies construed TILA's credit card provisions as applicable to all cardholders, including corporations.

The second case, *Credit Card Service Corp.* v. *Federal Trade Commission*, D.C. Cir. 1974, 161 U.S.App.D.C. 424, 495 F.2d 1004, involved an attempt by the Federal Trade Commission to make Credit Card Service Corporation disclose in its advertising the $50 limitation on a cardholder's liability for unauthorized use of his card. This court also reasoned that applying the exemption to the credit card provisions was illogical. The only event that could be a credit transaction was the unauthorized use itself, and the intent of the unauthorized user should not govern the applicability of the Act. The credit card company argued that cards issued to corporations were exempted from the Act, but the court could not understand why an exemption for certain credit *transactions* should apply to a *type* of credit card. *Id.* at 427, 495 F.2d at 1007. The court rejected applying the $50 limitation only when the last legitimate use of the card before the unauthorized use was personal, apparently believing it would be logical to make liability "depend on how a card was last used before it was lost or stolen". *Id.* at 427, 495 F.2d at 1007. It foresaw practical difficulties with a predominant use test because "[a] credit card is often used for both business and personal transactions". *Id.* at 428, 495 F.2d at 1008.

In 1974 TILA was amended to enact the circuit courts' decisions that § 1603 did not apply to the $50 limitation, 15 U.S.C. § 1645, and to state that the exemption did not apply to the provisions forbidding is-

suance of unsolicited cards and imposing criminal penalties for fraudulent use of credit cards. 15 U.S.C. § 1645.

Contemporaneously, Congress adopted several other amendments to the Act, including 15 U.S.C. § 1666.

III.

The district court held that Koerner could not invoke § 1666 because it "provides its own internal qualifications, generally extending its coverage to all transactions accomplished by means of a credit card issued to a natural person under a non-corporate account and excluding all others". 444 F.Supp. at 338.[1] The court based its holding on several factors. First, the language of § 1666 suggests that it was meant to apply only to consumer transactions. The term "cardholder", which includes corporations, does not appear in § 1666. The section instead uses the term "obligor", which it never defines. Section 1666(a) lists obligations of a creditor "in connection with an extension of consumer credit". And § 1666(d) states that a creditor "operating an open end consumer credit plan" cannot restrict or close an account under certain circumstances when an obligor believes there is a billing error. Second, an interpretation letter from the Acting Chief of the Fair Credit Practices Section of the Federal Reserve Board states that the requirements of the 1974 Fair Credit Billing Act[2] do not apply to cards embossed with the names of the company and employee and used by employees for business purposes only. *See* 5 CCH Consumer Credit Guide ¶ 31.338. In that case the company was liable for payment of goods

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[1] Although the district court decided that § 1666 provides its own internal qualifications, it did look to § 1603 for guidance in determining the reach of § 1666. *See* 444 F.Supp. at 338, 40-41.

[2] This Act contained the 1974 amendments to the Truth in Lending Act. *See id.* at 337 n. 9.

or services purchased with the card, and the employee was not sent an invoice or periodic statement. The letter should of course be given great weight. *See Ford Motor Credit Co.* v. *Milhollin*, —— U.S. ——, ——, 100 S.Ct. 790, 797-799, 63 L.Ed.2d 22 (1980). Third, the court believed that the legislative history of the 1974 amendments suggests that Congress was primarily worried about purportedly "high-handed tactics of card issuers in their handling of billing complaints" by consumers. 444 F.Supp. at 341. Finally, the court noted that § 1645, which was enacted at the same time as § 1666, held that the § 1603 exemptions were not applicable to §§ 1642-1644. Had Congress intended corporations to receive the benefit of the § 1666 protections, it could have said so in § 1645.

The district court formulated a "prospective predominant use test" to determine whether § 1666 applies to an account. The test is "applied at the opening of an account and based on the reasonably anticipated predominant use thereof". *Id.* at 340. The court in effect established a presumption that in "the majority of credit card accounts opened in the name of individuals who assume sole liability for debts to be incurred, predominant usage for non-business purposes is contemplated". *Id.* "[I]n the majority of accounts opened in the names of companies and relying in large part on company credit, such as the account involved in this litigation, it would be reasonable to anticipate predominant use for business or commercial purposes". *Id.* Occasional personal use of a card should not give rise to § 1666 obligations and penalties. The court would apply its presumptions "[s]hort of a prospective expression by the parties involved negativing such an intent". *Id.* Because Koerner's American Express card came under the business presumption, he failed to state a cause of action under TILA.

There are, however, strong reasons why § 1666 should apply to transactions for business or commercial purposes or transactions involving extensions of credit to corporations. First, although "cardholder" is not used in § 1666, it is used in §§ 1666f, h, & j, companion sections to § 1666. Moreover, the Federal Reserve Board uses "customer" rather than "obligor" throughout its regulations explaining § 1666. *See* 15 C.F.R. § 226.14. One definition of "customer" is "cardholder". *Id.* § 226.2 (u). The regulations deserve as great a weight as interpretation letters. Second, it is difficult to formulate a test for application of any business exemption. A predominant usage test similar to that suggested by the district court was rejected by the Second Circuit Court because it was "totally unwieldy". *See American Airlines, Inc.* v. *Remis Indus.*, 2 Cir. 1974, 494 F.2d 196, 201. The presumptions could be easily evaded: Business could have individual employees acquire credit cards in their own names and agree to reimburse them for business uses of the card.

Determining whether § 1666 covers corporate transactions and transactions for business or commercial purposes is obviously difficult. We need not resolve that question, because a narrower ground for decision exists in this case. Koerner signed a statement joining in the application and assuming joint and several liability for any debts.[3] Therefore, American Express could recover from him or from the company. If it can recover from a consumer, then it must abide by the requirements of

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[3] Although the agreement stated that Koerner and the company had "joint and several" liability for charges incurred with the card, the correct civil law term is "in solido" liability. *See* La.Civil Code Art. 2091. The terms have the same meaning. *Johnson* v. *Jones-Journet*, La. S.Ct. 1975, 320 So.2d 533, 536; *Ford Motor Co.* v. *Soileau*, La. 3 Cir. 1975, 323 So.2d 221, 225.

§ 1666 for correction of billing errors in a consumer's credit card statement. The credit card company cannot have it both ways: If it does not want to be bound by consumer lending requirements, then it should not be allowed to collect its debts from a consumer. Although our decision prevents application of the § 1603 exemption "for business or commercial purposes" to § 1666 when an individual is liable for debts incurred, this result is consonant with the purpose of the Fair Credit Billing Act of 1974—protecting consumers from the harassment of creditors. *See* S.Rep.No. 278, 93d Cong., 1st Sess. 1-2, 4-6 (1973); S.Rep.No. 750, 92d Cong., 2d Sess. 1-4 (1972).

American Express attempts to avoid this result by arguing that Koerner is merely a surety for the company, and that the company is ultimately responsible for the debt. A repayment agreement, if any, would be between the company and the individual, and does not bind American Express. It can collect from either obligor. Although Koerner might sue the company for indemnification if the debts incurred represented business expenses, he would remain personally liable if he lost that suit or if the company was insolvent. Whether Koerner could recover his payment from the company depends upon the existence of an agreement between them and the continued solvency of the company.

American Express cannot have its cake and eat it too. We therefore REVERSE and REMAND to the district court for proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1290

LOUIS R. KOERNER, SR., individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

versus

THE AMERICAN EXPRESS COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion April 7, 1980, 5 Cir., 197—, —— F.2d ——).

(May 12, 1980)

Before WISDOM, GOLDBERG and HENDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Albert J. Henderson

United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
E. D. LOUISIANA

Civ. A. No. 76-3660

LOUIS R. KOERNER, SR., ETC.

v.

THE AMERICAN EXPRESS COMPANY

Dec. 8, 1977

Louis R. Koerner, Jr., Stephen M. Bernstein, New Orleans, La., for plaintiff.

Peter Frank Liberto, Chaffe, McCall, Phillips, Toler & Sarpy, David L. Campbell, Lemle, Kelleher, Kohlmeyer & Matthews, New Orleans, La., for defendant.

MEMORANDUM OPINION AND ORDER

EDWARD J. BOYLE, Sr., District Judge:

Invoking the court's jurisdiction pursuant to 15 U.S.C. § 1640(e), its counterparts 28 U.S.C. §§ 1331 and 1337, and the general diversity jurisdiction statute, 28 U.S.C. § 1332, plaintiff, Louis R. Koerner, Sr., seeks injunctive relief and damages for alleged violations by American Express, Inc. (American Express) of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601 *et seq.* Plaintiff brings these claims on his own behalf and seeks to represent an alleged class of persons similarly situated. Pendant to the claims are plaintiff's demands for relief based on an alleged breach of duties imposed upon American Express by Louisiana law.

The defendant has filed a Motion for Summary Judgment dismissing the federal claims on the grounds that

the statute claimed to have been violated, 15 U.S.C. § 1666, which deals with correction of billing errors, does not apply to transactions of a business or commercial nature and that holders of credit cards issued under a company account do not qualify as "consumers" as that term is defined in the TILA. The motion also seeks dismissal of the state claims on the grounds that they fail to meet the required jurisdictional amount. Following a hearing on the motion, a United States Magistrate rendered his report, recommending that the motion be granted on the basis that the instances of card usage which led to the alleged Truth in Lending violations were exempted from coverage by the Act and plaintiff, therefore, had failed to state a cause of action under the federal statute. Further, it was recommended that plaintiff's state claim, supportable only under diversity jurisdiction in the absence of a viable federal claim, be dismissed.[1] Plaintiff has filed timely objections to the recommendations of the Magistrate as they relate to the Truth in Lending claims, specifically asserting that the report failed to reconcile with its conclusions the case of *American Airlines, Inc. v. Remis Industries, Inc.*, 494 F.2d 196 (2 Cir. 1974). After considering the record, the memoranda of counsel in support of and opposition to plaintiff's objections to the Magistrate's Report and Recommendation, and the law applicable, we have concluded that said objections should be overruled and defendant's Motion for Summary Judgment dismissing plaintiff's complaint should be granted.

The pertinent facts, which are uncontested unless otherwise noted, are as follows:

1. On November 16, 1965, an application for a credit card was completed on a company account form. It was

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[1] In conference, plaintiff stipulated that his state claim would not reach the requisite jurisdictional amount. (*See* ¶ B of Minute Entry dated March 30, 1977, Rec.Doc. # 16).

signed by the company through one of its officers and by *John E.* K erner, Jr., who was designated as an individual authorized to receive a card in the company name. Bank and credit references were requested of and supplied by the company only. According to the application, all billings were to go to the company at its office address. Following approval of the application, the company account was opened and the card issued.[2]

2. Also on November 16, 1965, a form labelled "Application for Supplementary Credit Card, Company Account" was completed by the company through one of its officers and by *Louis R.* Koerner, plaintiff herein. No additional bank or credit references were requested. The application was approved and the card was issued.[3]

3. Apparently, additional supplementary company cards were issued to *Ralph E.* Koerner, Dennis Thomas and Carroll A. DeGeorge. All cards, including those mentioned above, were embossed with the company name and the name of the individual cardholder.[4]

4. All charges for use of plaintiff's card, as well as other company cards, were billed to the company and statements of combined billing, showing subtotals by individual cards, were mailed to it at its business address.[5]

5. From the date of issuance of the supplementary card to plaintiff, he has remitted payment for a number

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[2] *See* Exhibit 1 to defendant's Motion for Summary Judgment, Rec.Doc. # 6.

[3] *See* Exhibit 2 to Motion for Summary Judgment, *supra.*

[4] *See* Exhibit 3 to Motion for Summary Judgment, *supra.*

[5] *See* ¶ 3, defendant's Statement of Uncontested Material Facts, appended to Motion for Summary Judgment, *supra,* admitted in ¶ 3 of plaintiff's Opposition to Statement of Uncontested Material Facts, appended to his opposition memorandum, Rec.Doc. # 10.

of transactions with a total of seven personal checks. Payment for all other charges (excluding those currently disputed) was made by the company.[6]

6. A billing dispute arose over the following charges included on the combined billing statements sent to the company:[7]

(a) Three debits in the amount of $3.00 each and one debit in the amount of either $3.00 or $6.00 for charges made by plaintiff in July, August, September and October of 1975 for air flight insurance for trips conducted for business purposes.

(b) A debit of $20.00 representing, according to plaintiff, "a charge for Mr. John E. Koerner's card which was returned and for which credit was never given." This, presumably, was a renewal fee for a card no longer desired.

(c) A debit of $20.00, ultimately cancelled by a credit which plaintiff asserts was "a charge for a card of Ralph E. Koerner." The nature of the charge has not been established.

7. Although American Express communicated with the company regarding the alleged billing errors, the dispute remained unresolved on September 28, 1976. On that date, plaintiff was asked to speak by phone to a representative of American Express when he attempted to use his card for the purchase of an airline ticket at N.O. International Airport. Following conversation with the representative as requested, plaintiff was presented with his credit card cut in half. The purpose of the trip

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[6] *See* ¶ 9 of plaintiff's Answers to Interrogatories, Rec. Doc. # 21.

[7] *See* ¶¶ 3 through 9 of plaintiff's Answers to Interrogatories, *supra*.

for which the ticket was to be purchased was business related.[8]

Plaintiff argues that this withdrawal was in violation of the creditor's obligations established by § 161 of the TILA, 15 U.S.C. § 1666, which was added on October 28, 1974,[9] and became effective one year later.[10] Section 1666 regulates the conduct of cardholders and card issuers, among other creditors, relating to possible billing errors. Plaintiff also alleges that defendant has violated § 127 of the Act, 15 U.S.C. § 1637, which requires that periodic disclosures be made by creditor, and which plaintiff asserts "is made applicable to American Express through § 1666." Therefore, plaintiff will be able to proceed to the merits of his Truth in Lending claims only upon a determination that § 1666 is applicable in the present situation.

American Airlines, Inc. v. *Remis Industries, Inc.*, supra, on which plaintiff relies as being controlling,[11] dealt not

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[8] *See* ¶¶ 9 through 13 of Complaint, Rec.Doc. # 1.

[9] P.L. 93-495 was enacted on October 28, 1974 and consists of six titles. Title III—Fair Credit Billing—amended various provisions of the Act and added to it, as Chapter 4—Credit Billing—sections 161 through 171 [15 U.S.C. §§ 1666-1666(j)]. While the name "Fair Credit Billing Act" is in fact the short title for all of Title III of P.L. 93-495, it is the name popularly given to Chapter 4 of the Truth in Lending Act. (*See* Historical Notes following text of § 1666 in 15 U.S.C.S.). Section 135, 15 U.S.C. § 1645, also discussed in this opinion, was added to the TILA as part of Title IV of the 1974 legislation.

[10] § 308 of the TILA.

[11] The narrow holding of *Remis* is that 15 U.S.C. § 1643(a), which establishes a $50 limitation on cardholders' liability for fraudulent use of their cards, protects all credit card holders, individual and corporate alike.

with the 1974 amendments to the TILA but with the 1970 amendments, the first provisions of the Act to deal with credit cards. The 1970 credit card provisions include § 132 (15 U.S.C. § 1642), which prohibits the unsolicited issuance of cards, § 133 (15 U.S.C. § 1643), which limits the liability of cardholders for fraudulent use of their cards, and § 134 (15 U.S.C. § 1644), which establishes penalties for fraudulent use. These provisions are implemented by the Federal Reserve Board, the agency given regulatory and advisory powers under the Act,[12] which has promulgated Regulation Z.[13]

Since its enactment in 1968, the TILA has provided for a "business use exemption." The exemption is stated in § 104(1) of the Act, 15 U.S.C. § 1603(1), which reads:

> This title [15 U.S.C. § 1601 et seq.] does not apply to . . . [c]redit transactions involving extensions of credit for business or commercial purposes . . . .

The exemption is repeated in Regulation Z (12 C.F.R. § 226.3(a)). The history of the relationship between the exemption and the TILA's early credit card provisions is outlined in a letter from the Federal Reserve Board, which, in pertinent part, states:

> In administering [Regulation Z] staff at first interpreted [12 C.F.R. § 226.3(a)] to mean that credit cards used for business purposes were not subject to the provisions of § 226.13 . . . regarding issuance of credit cards and liability for unauthorized use. More extensive experience with the Act, however, indicated that the congressional intent and the purposes of the legislation would be better served by including such cards within the coverage of the sec-

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[12] 15 U.S.C. §§ 1604, 1607(d), 1608, 1609, 1613.

[13] See 12 C.F.R. Part 226—Truth in Lending. Section 226.13 relates to credit card transactions.

> tion, and Regulation Z was amended on December 12, 1972, to include credit cards issued for business purposes (§ 226.13(a)(4), renumbered as 226.2(m) . . .).[14]
>
> In its annual reports to Congress, the Board recommended that the Truth in Lending Act be amended to reflect this interpretation of the credit card provisions. Public Law 93-495 enacted on October 28, 1974, gave effect to this recommendation in § 410 [15 U.S.C. § 1645], which provides that the business purpose exemption of the Act does not apply to the credit card provisions. Therefore, a credit card issuer supplying cards to a company or its employees must comply with all relevant provisions of § 226.13 of Regulation Z. Federal Reserve Board Letter No. 898 of June 15, 1975 by Susan B. Collins, Attorney, Fair Credit Practices Section, *quoted in*, 5 CCH Consumer Credit Guide, ¶ 31,232.

On March 15, 1974, a time prior to the enactment of § 1645 which negates the operation of the § 1603 business use exemption in §§ 1642, 1643 and 1644, the opinion in *Remis*, supra, was rendered and provided a judicial pronouncement that § 1643(a)—limiting cardholders' liability for fraudulent use—applies to all cardholders, individual and corporate alike. Plaintiff's argument therein, that § 1603 excluded corporate cardholders from the protection afforded by § 1643, was rejected. The court viewed the argument as contrary to the uniform interpretation of the relationship between § 1603(1) and the 1970 credit card provisions voiced by the Federal

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[14] 12 C.F.R. § 226.2(m) reads: "Cardholder' means any person [person is defined to include both natural persons and organizations in 12 C.F.R. § 226.2(bb)] to whom a credit card is issued for personal, family, household, agricultural, *business, or commercial purposes* . . ." (Emphasis ours).

Reserve Board and the Federal Trade Commission and out of harmony with the expanded definition of "cardholder" provided by § 226.2(m) of Regulation Z. Further, plaintiff's argument foundered on principles of statutory construction. The court found that it was all but impossible to superimpose on the liability limitation statute the transaction-by-transaction analytical approach embodied within the business use exemption and, additionally, discarded a "predominant use" test as "wholly unwielding in application." [15] Thus, in the face of a conflict between the two sections of the TILA § 1643, unencumbered by § 1603(1), prevailed as the latest expression of legislative will.[16]

The issue raised by the instant motion is phrased by the parties as whether or not § 1603(1) is applicable to § 1666. Plaintiff argues that § 1603(1) is no more capable of being given effect in the enforcement of the 1974 amendments, including § 1666, than it would have been in the administration of the 1970 amendments and therefore asserts that § 1666 applies to card issuers in all instances. Defendant argues that the absence of an abjurement of the applicability of § 1603(1) to § 1666, enacted as a part of the Act which created § 1645,[17] reveals congressional intent to allow § 1603(1) to operate with respect to § 1666 and thereby exclude all business transactions.

For reasons stated below, we find that § 1666 provides its own internal qualifications, generally extending its coverage to all transactions accomplished by means of a credit card issued to a natural person under a

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[15] *American Airlines, Inc.* v. *Remis Industries, Inc., supra,* at 200-201.

[16] *Id.*

[17] *See* n. 2.

non-corporate account and excluding all others. Additionally, while we agree with *Remis* that a "purpose of use" test applied to each transaction is highly unsuited to the administration of credit card provisions and would similarly reject a "predominant use" test applied retrospectively at the litigation stage as an inadequate behavioral guide to card issuers and an unwieldy and inappropriate judicial tool, we cannot accept the implication in *Remis* that these approaches are the only ones available under § 1603(1). We find no conflict between the concurrent operation of the limitations imposed by §§ 1603(1) and 1666 and follow the rule of statutory construction stated in *Remis*:

> Effect is to be given to [provisions introduced by the amendatory act and those of the original section] . . . and they are to be interpreted so they do not conflict.

Remis, supra, at 200, and treatise cited therein.

At the outset, we note that the term "cardholder," expanded in 1972 to include corporate cardholders [18] is conspiciously absent within the confines of § 1666. Instead, the term "creditor," which is defined in 15 U.S.C. § 1602(f) to include card issuers,[19] in turn defined in § 1602(n) simply as any person or his agent who issues a credit card, is used throughout, with a correlative designation of the consumer as the "obligor." Section

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[18] *See* n. 14.

[19] Section 1602(f), as amended in 1974 by Title III of P.L. 93-495, reads in part: "For the purposes of the requirements imposed by Chapter 4 and [other sections of the Act], the term 'creditor' shall also include card issuers . . . and the Board shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open end credit plans.

1666(a) sets forth a scheme for the orderly resolution of disputes over the correctness of statements transmitted by creditor to obligor "of the obligor's account in connection with an extension of *consumer credit.*" (Emphasis ours.) Billing errors, as defined in § 1666 (b), consist of computation errors, reflections of an extension of credit either not made to the obligor, not made in the amount shown for goods or services not accepted by or properly delivered to obligor, or for which additional clarification is needed, and any other error described in regulations of the Board.[20] Under § 1666 (d), creditors "operating an open end consumer credit plan" may not restrict or close an account solely because of obligor's failure to pay an amount in dispute, prior to the sending of a written explanation or clarification as required by the statute. A penalty of forfeiture of any right to collect the contested amount is imposed on creditors by § 1666(c).

The qualification which serves to limit the obligations of card issuers under § 1666 is contained in the statute's stipulation in § 1666(a) that statements of account containing potential discrepancies be connected with an extension of credit that is consumer in nature. Under the TILA, an "extension of credit" may be viewed as occurring at two points: at the opening of the account and issuance of the first card thereunder, and at the consummation of transactions for goods or services through card usage.[21] The term is used in both senses

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[20] Section 1666 is implemented by 12 C.F.R. § 266.14.

[21] The Act's definition of "credit" includes not only the right to defer payment on a debt, but also the right to incur debts and defer payment of them. 15 U.S.C. § 1602(e). Regulation Z's counterpart to this definition appears in 12 C.F.R. § 226.2(q) and was renumbered in 1970. *See* notation under "Amendments" following text of § 1602 of Title 15 in U.S.C.S.

within § 1666. Subsections (1) and (2) of § 1666(b), which defines billing errors, unquestionably speak of individual, accomplished transactions as extensions of credit. However, the term as used in § 1666(a), which governs the scope of cardholders' obligations established therein, can only refer to the extension of credit which occurs when the right to incur debts and defer payment is created at the opening of the account. The statute, as it pertains to cardholders, obviously was not designed to proceed on a transaction-by-transaction basis. An error in computation, for example, also defined as a "billing error" in 1666(b), cannot always be attributed to a single transaction. Nor could the "consumer" or "non-consumer" nature of a charge made by a person other than cardholder but mistakenly billed to cardholder's account, again a "billing error," be relevant to the scope of coverage. Further, a charge for the renewal of a card no longer desired represents no "transaction" at all. In addition, the prohibition provided by § 1666 (d) against restriction or closing of accounts addresses itself exclusively to creditors operating "an open end *consumer credit plan.*" (Emphasis ours.) Thus, it is the account (or the plan) and not individual transactions which must be characterized as consumer in nature in order to determine the section's applicability to card issuers.

The TILA's definition of the word "consumer" appears in 15 U.S.C. § 1602(h), which reads:

> The adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which [1] the party to whom credit is offered or extended is a natural person, and [2] the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.

The substance of this definition is reproduced in Regulation Z in its definition of "consumer credit." [22] These definitions, further adapted for present purposes, would be transformed into the following definition: a "consumer credit account or plan" is one offered to a natural person for non-business (but including agricultural) purposes. Because of the obvious potential for overlapping uses of a single card, it is appropriate that the definition incorporate a kind of "prospective predominant use" test, one applied at the opening of an account and based on the reasonably anticipated predominant use thereof.

Although we have no statistics to offer on the subject, we believe it may be reasonably said that, in the majority of credit card accounts opened in the name of individuals who assume sole liability for debts to be incurred, predominant usage for non-business purposes is contemplated. Short of a prospective expression by the parties involved negativing such an intent, these accounts should be characterized as consumer credit accounts. Business transactions conducted thereunder should not be allowed to nullify the protection afforded by § 1666. Nor is it anticipated that card issuers will be less than uniform in their handling of billing complaints due to the obvious difficulties of perceiving the nature of individual transactions as complaints are lodged and the consequences that could attend a wrong guess. Just as plainly, in the majority of accounts opened in the names of companies and relying in large part on company credit, such as the account involved in this litigation, it would be reasonable to anticipate predominant use for business or commercial purposes. If an occasional personal use of a corporate card had the effect of imposing

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[22] 12 C.F.R. § 226.2(p), renumbered in 1970. *See* notation under "Amendments" following text of § 1602 of Title 15 in U.S.C.S.

upon card issuers the obligations and penalties of § 1666 which otherwise are inapplicable to company accounts, the section's requirement that a "consumer credit plan" be involved could be rendered meaningless. Such accounts should not be considered "consumer" in nature.[23]

The TILA's general "business use exemption" contained in § 1603(1) can be read to provide the same general exclusion of corporate credit card accounts. The section operates to exempt from the TILA "credit transactions involving extensions of credit for business or commercial purposes." As previously noted, all transactions made through use of a card issued under a company plan involve "extensions of credit"—which, for the purposes of § 1666, means the right to incur debts and defer payment—for business or commercial purposes. Thus, all such transactions are exempted from § 1666 by § 1603(1). Conversely, transactions completed by use of a non-company card generally do involve "extensions of credit" for personal use and, by the negative implication of § 1603(1), are subject to the Act's requirements.

A letter from the Acting Chief of the Fair Credit Practices Section of the Federal Reserve Board reflects that agency's understanding that, unlike the 1970 amendments to the Act, the provisions of Chapter 4, added to the Act in 1974, have limited application to cardholders because of § 1603(1). There, the Board opined that,

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[23] On the company application for a supplementary card for plaintiff, he signed a standard, printed statement joining in the application and assuming joint and *in solido* liability for charges to be incurred. The character of this commitment was not discussed by the parties in these proceedings. If plaintiff's undertaking was intended to be in the nature of a guaranty or suretyship, the primary obligor being the company, as appears the case here, the requirement that credit be extended to a "natural person" also would bar classification of the account as a "consumer credit" one.

although Regulation Z defined "creditors" to include card issuers and defined "cardholders" to include corporate cardholders, the Fair Credit Billing Act (*see* n. 2) does not apply to card issuers in relation to corporate cardholders using the cards solely for business purposes. "This is so," the letter states, "in view of the exemption for credit extended to organizations for business or commercial purposes in § 226.3(a) [Regulation Z's counterpart to § 1603(1)]."[24] This administrative expression concerning the proper construction of the TILA, although not controlling, is to be afforded great weight.[25]

Additionally, although the extent of the coverage of the Fair Credit Billing Act vis-a-vis corporate cardholders was not a topic of Congressional discussion during consideration of the amending bills, there is evidence that the legislators understood and intended that such cardholders would not be included. First, throughout the history of the 1974 amendments to the Act,[26] statements of the need for the legislation to correct purportedly high-handed tactics of card issuers in their handling of billing complaints remained constant and unchallenged. While consumers were recognized as beneficiaries of the phenomenal growth of the credit card industry and the use of computerized billing systems, they were also depicted as victims of the new mechanism, frustrated in their attempts to have billing errors corrected through communications with a "robot," harassed by dunning letters, and prone to acquiesce in payment

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[24] Federal Reserve Board Letter No. 1004 of February 10, 1976, *quoted in*, 5 CCH Consumer Credit Guide, ¶ 31,338.

[25] *See American Airlines, Inc.* v. *Remis Industries, Inc.*, *supra*, at 202, and cases cited therein.

[26] *See* Appendix A attached—"1974 Amendments to the Truth in Lending Act," 8 Clearinghouse Rev. 851, at 851, n. 2.

when confronted with the creditors' powerful weapons of threats of ruination of credit ratings and institution of legal action against them.[27] The credit card explosion was demonstrated by statistics which indicated that one-half of all American families used at least one credit card[28] and that, for the average family, charge accounts and monthly bill paying have become a way of life.[29] Perhaps because of the greatly diminished effectiveness of the creditors' weapons when levelled at businesses, the focus was placed on, and the legislation apparently was intended to protect, the family man in his personal dealings. The terms "consumer" and "consumer credit transactions" were used throughout[30] and, as terms of art in the context of the Truth in Lending Act, should be received in their restricted meaning to exclude corporate cardholders and transactions conducted under a commercial account.

Second, when the amendments were reintroduced in the Senate in February of 1973, they incorporated a section which was to become § 1645 of the Act. The text of the proposed new provision (to which amendments not relevant here were later made) read:

> The provisions of section 104(1) [15 U.S.C. § 1603 (1)] shall not apply to sections 132, 133, and 134 [15 U.S.C. §§ 1642, 1643, and 1644]. 119 Cong. Rec. S. 2820 (daily ed. Feb. 20, 1973) § 210.

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[27] *See* S.Rep. No. 92-750, 92d Cong., 2d Sess. (1972), at 2-4, 118 Cong. Rec. S. 6886 (daily ed. Apr. 27, 1972), 119 Cong. Rec. S. 2803-2805 (daily ed. Feb. 20, 1973), S. Rep. No. 93-278, 93d Cong., 1st Sess. (1973), at 5-6, 119 Cong. Rec. S. 14404 (daily ed. July 23, 1973).

[28] *See, e.g.*, S. Rep. No. 93-278, *supra*, at S. 2803.

[29] *See* 119 Cong. Rec. S. 2804 (daily ed. Feb. 20, 1973).

[30] *See* n. 27.

The proposed statute was among those drafted by the Federal Reserve Board and recommended to Congress in the Annual Report of the Board for the year ending December 31, 1972, which was ordered printed in the Congressional Record for that date. In pertinent part, it states:

> . . . To clarify the matter [of whether the TILA's business exemption applied to the prohibition against the unsolicited issuance of credit cards and to the $50 limit on liability for their unauthorized use], the Board amended section 226.13 of Regulation Z to provide that each credit card, regardless of whether issued or used for personal, family, household, agricultural, business or commercial purposes, and regardless of whether issued to a natural person, corporation, or other business entity is covered by [§§ 1642, 1643, and 1644]. *These amendments do not affect the business exemption in its application to the disclosure*, recission and advertising *requirements.* (Emphasis ours.)

119 Cong. Rec. S. 2811-12 (daily ed. Feb. 20, 1973). The portion of the annual report underscored in the passage quoted above indicates that the legislators were well aware that the listing of sections to which the business exemption would not apply under authority of the proposed § 1645 was exclusive and that the exemption would continue to operate in § 1637, which prescribes the disclosure obligations of creditors. Section 1637, under the legislation being considered, was to be amended to require that disclosures be made to obligors stating the creditors' responsibilities with regard to handling of billing errors as they would be established by Chapter 4.[31]

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[31] *See* 119 Cong. Rec. S. 2818, § 104 (daily ed. Feb. 20, 1973). The added provision appears at 15 U.S.C. § 1637 (a) (8).

It would indeed be anomalous to conclude that Congress intended § 1666 to afford protection to corporate cardholders when it failed to require that disclosures regarding the rights created by § 1666 be made to that segment of the cardholding population.

Thus, we find that § 1666 is inapplicable to defendant in its status as a card issuer extending credit under a non-consumer, company account. No investigation need be made into the subjective motivation behind each instance of card use which may be linked causally to the revocation of plaintiff's card. We hold that plaintiff has failed to state a cause of action under the federal Truth in Lending Act.[32] Additionally, we again note plaintiff's concession that his state claims do not involve the amount required for diversity jurisdiction.[33] Plaintiff's objections to the Magistrate's Report and Recommendations are overruled and, accordingly, defendant's Motion for Summary Judgment of dismissal of plaintiff's alleged federal and state claims is GRANTED.

Judgment shall be entered in favor of defendant, dismissing plaintiff's complaint at his costs.

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[32] There is no merit to plaintiff's contention that American Express should be estopped from raising the defense of exclusion because it had sent to plaintiff a statement of obligors' rights under the statute. The parties cannot create a federal right and thereby confer jurisdiction on the courts. Wright & Miller, Federal Practice and Procedure: Civil § 3522 at 46-47.

[33] *See* n. 1.

APPENDIX A

1974 AMENDMENTS TO THE TRUTH IN LENDING ACT

By National Consumer Law Center, Inc.*

I. INTRODUCTION

The Truth in Lending Act (TILA) was significantly amended on October 28, 1974. Because many of the amendments apply to pending TILA lawsuits, the amendments should be studied closely by anyone contemplating or pursuing TILA litigation.[1] This article summarizes the amendments to the TILA disclosure provisions and their legislative history, and examines the issues which may effect low income consumers.

The Act contains many provisions other than TILA disclosure amendments which are not the subject of this article but which should be noted by consumers and their lawyers. These provisions establish rights for consumers faced with billing errors, restrict sex discrimination in the extension of credit, amend banking regulations, and create a National Commission on Electronic Funds Transfers. The provisions on billing errors and sex discrimination will not become effective until October 28, 1975, allowing time for the Federal Reserve Board (FRB) to promulgate regulations.

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* One Court Street, Boston, Mass. 02108, (617) 523-8010.

[1] The text of P.L. No. 93-495 may be found at: 88 Stat. 1500; 43 U.S.L.W. 127, 130-135 (December 10, 1974); 12 *U.S. Code Cong. & Admin. News* 1974: 5684, 5697-5714 (December 15, 1974); and 1 *CCH Consumer Credit Guide* ¶¶ 3005-3065 (December 10, 1974) (Titles III and IV only).

The 1974 TILA amendments were passed by means of a legislative shortcut which considerably diminished their consideration by the House of Representatives.[2] The

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[2] The history of the 1974 TILA amendments began with a bill introduced in the Senate during the first session of the 92d Congress on February 8, 1971, by Senators Proxmire and Brooke. The Senate Subcommittee on Financial Institutions held hearings on October 26-29, 1971, and executive sessions on March 7-8, 1972. The full Senate Committee on Banking, Housing and Urban Affairs met in executive session March 15, 1972 and favorably reported out S.652 with some amendments. S. REP. No. 92-750, 92d Cong., 2d Sess. (1972). The Senate passed S.652 on April 27, 1972, after extensive debate. *See* 118 CONG. REC. S.6882-6928 (April 27, 1972). However, the bill died because the House took no action on the bill during the 92d Congress after its referral to the House Committee on Banking and Currency on May 1, 1972.

TILA amendments were reintroduced, on February 20, 1973, as S.914 in the first session of the 93d Congress. *See* 119 CONG. REC. S.2803-2820 (Feb. 20, 1973). Several alternative and related bills were also introduced. Senators Sparkman (D. Ala.) and Brock (R. Tenn.) introduced alternative bill S.1630 on April 18, 1973.

The new Senate Subcommittee on Consumer Credit held hearings on S.914 and S.1630 on May 21-24, 1973, and met again June 19-20, recommending a revised bill to the full Senate Committee on Banking, Housing and Urban Affairs which included provisions of both S.914 and S.1630. The full Committee met June 27, 1973 and, after amending the revised bill recommended by the Subcommittee, added a new Title III on equal credit opportunity that incorporated the substance of S.867 and S.1605. The Committee then reported out a clean bill numbered S.2101. S. REP. No. 93-278, 93d Cong., 1st Sess. (1973).

During debates on the revised and renumbered bill S.2101 held on July 23, 1973, the Senate rejected amendments offered by Senators Proxmire and Moss (D. Utah) and approved minor amendments offered by Senator Brock. *See*

Senate had considered and passed several bills to amend the TILA since 1971, generating committee hearings and reports. However, those bills died without House action. The last Senate bill concerning TILA amendments (S. 2101) was appended to a House bill on depository institutions (H.R. 11221) and passed the House virtually without debate. The act was signed by President Ford on October 28, 1974, and most of the TILA amendments became effective on that date.[3] Three amendments—disclosure of real estate closing costs, codification of the Regulation Z "more than four instalment" rule, and identification of open end transactions within periodic statements—will become effective one year later, October 28, 1975.

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119 CONG. REC. S.14403-14431 (July 23, 1973). The bill then passed the Senate and was referred to the House where it languished in the House Banking Committee for the next year.

On June 13, 1974 the Senate unanimously passed H.R. 11221 concerning depositary institutions, to which the provisions of S.2101 had been appended. *See* 120 CONG. REC. S.10551-10582 (June 13, 1974). On October 4, 1974 Rep. Patman (D. Tex.) filed the House conference report on H.R. 11221. *See* 120 CONG. REC. H.9935-9994 (October 4, 1974). The House passed Bill 355-1 on October 9, 1974, over the heated objection of Reps. Sullivan (D. Mo.) and Eckhardt (D. Tex.) that newly added sections, including the TILA amendments, had never been the subject of full House debates. *See* 120 CONG. REC. H.10269-10281 (Oct. 9, 1974). The Senate approved the conference report on October 10, 1974. *See* 120 CONG. REC. S.18754 (Oct. 10, 1974). The bill was signed into law by President Ford on October 28, 1974.

[3] *See* text accompanying nn. 46-52 for additional discussion of effective date.

II. CODIFICATION OF EXISTING CASE LAW

Most of the TILA amendments comprise substantive changes in the law. These will be discussed below. However, two amendments merely codified existing case law and require only brief mention. First, amended TILA Subsections 125(a) and (b)[4] affirm that the term "security interest" as used in the TILA includes liens arising by operation of * * *.

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[4] 15 U.S.C. §§ 1635(a) and (b).

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SECTION "D"

Civil Action No. 76-3660

LOUIS R. KOERNER, SR., Individually and on behalf of all others similarly situated

versus

THE AMERICAN EXPRESS COMPANY

JUDGMENT

Considering the Court's Memorandum Opinion and Order filed herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, The American Express Company, and against plaintiff, Louis R. Koerner, Sr., Individually and on behalf of all others similarly situated, dismissing plaintiff's complaint at his costs.

New Orleans, Louisiana, this 9th day of December, 1977.

/s/ Nelson B. Jones
NELSON B. JONES
Clerk

Approved as to form:

/s/ Edward Boyle, Sr.
United States District Judge

APPENDIX E

Sections 104(1) and 161 of the Truth-in-Lending Act, 15 U.S.C. § 1603(1) and 1666 (1976):

§ 104. Exempted transactions

This subchapter does not apply to the following:

(1) Credit transactions involving extensions of credit for business or commercial purposes, or to government or governmental agencies or instrumentalities, or to organizations.

(Pub. L. 90-321, Title I, § 104, May 29, 1968, 82 Stat. 147.)

§ 161. Correction of billing errors.

(a) If a creditor, within sixty days after having transmitted to an obligor a statement of the obligor's account in connection with an extension of consumer credit, receives at the address disclosed under section 127(b)(11) of this title a written notice (other than notice on a payment stub or other payment medium supplied by the creditor if the creditor so stipulates with the disclosure required under section 127(a)(8) of this title) from the obligor in which the obligor—

(1) sets forth or otherwise enables the creditor to identify the name and account number (if any) of the obligor,

(2) indicates the obligor's belief that the statement contains a billing error and the amount of such billing error, and

(3) sets forth the reasons for the obligor's belief (to the extent applicable) that the statement contains a billing error,

the creditor shall, unless the obligor has, after giving such written notice and before the expiration of the

time limits herein specified, agreed that the statement was correct—

(A) not later than thirty days after the receipt of the notice, send a written acknowledgement thereof to the obligor, unless the action required in subparagraph (B) is taken within such thirty-day period, and

(B) not later than two complete billing cycles of the creditor (in no event later than ninety days) after the receipt of the notice and prior to taking any action to collect the amount, or any part thereof, indicated by the obligor under paragraph (2) either—

(i) make appropriate corrections in the account of the obligor, including the crediting of any finance charges on amounts erroneously billed, and transmit to the obligor a notification of such corrections and the creditor's explanation of any change in the amount indicated by the obligor under paragraph (2) and, if any such change is made and the obligor so requests, copies of documentary evidence of the obligor's indebtedness; or

(ii) send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account of the obligor was correctly shown in the statement and, upon request of the obligor, provide copies of documentary evidence of the obligor's indebtedness. In the case of a billing error where the obligor alleges that the creditor's billing statement reflects goods not delivered to the obligor or his designee in accordance with the agreement made at the time of the transaction, a creditor may not construe

such amount to be correctly shown unless he determines that such goods were actually delivered, mailed, or otherwise sent to the obligor and provides the obligor with a statement of such determination.

After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make substantially the same allegation with respect to such error.

(b) For the purpose of this section, a "billing error" consists of any of the following:

(1) A reflection on a statement of an extension of credit which was not made to the obligor or, if made, was not in the amount reflected on such statement.

(2) A reflection on a statement of an extension of credit for which the obligor requests additional clarification including documentary evidence thereof.

(3) A reflection on a statement of goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction.

(4) The creditor's failure to reflect properly on a statement a payment made by the obligor or a credit issued to the obligor.

(5) A computation error or similar error of an accounting nature of the creditor on a statement.

(6) Any other error described in regulations of the Board.

(c) For the purposes of this section, "action to collect the amount, or any part thereof, indicated by an obligor under paragraph (2)" does not include the sending of

statements of account to the obligor following written notice from the obligor as specified under subsection (a) of this section, if—

(1) the obligor's account is not restricted or closed because of the failure of the obligor to pay the amount indicated under paragraph (2) of subsection (a) of this section, and

(2) the creditor indicates the payment of such amount is not required pending the creditor's compliance with this section.

Nothing in this section shall be construed to prohibit any action by a creditor to collect any amount which has not been indicated by the obligor to contain a billing error.

(d) Pursuant to regulations of the Board, a creditor operating an open end consumer credit plan may not, prior to the sending of the written explanation or clarification required under paragraph (B)(ii), restrict or close an account with respect to which the obligor has indicated pursuant to subsection (a) of this section that he believes such account to contain a billing error solely because of the obligor's failure to pay the amount indicated to be in error. Nothing in this subsection shall be deemed to prohibit a creditor from applying against the credit limit on the obligor's account the amount indicated to be in error.

(e) Any creditor who fails to comply with the requirements of this section or section 162 forfeits any right to collect from the obligor the amount indicated by the obligor under paragraph (2) of subsection (a) of this section, and any finance charges thereon, except that the amount required to be forfeited under this subsection may not exceed $50.

(Pub. L. 90-321, Title I, § 161, as added Pub. L. 93-495, Title III, § 306, Oct. 28, 1974, 88 Stat. 1512.)

APPENDIX F

Section 226.3(a) of Regulation Z, 12 C.F.R. § 226.3 (a):

§ 226.3 Exempted transactions.

This part does not apply to the following:

(a) *Business or governmental credit.* Extensions of credit to organizations, including governments, or for business or commercial purposes, other than agricultural purposes.

APPENDIX G

Federal Reserve Board Public Information Letters Pertaining to the "Business or Commercial Purpose" Exemption:

No. 277

Rescission—security interest in guarantor's home in business transaction

March 10, 1970

We are pleased to respond to your letter in which you ask several questions regarding the application of the Truth in Lending provisions to a commercial credit transaction in which a corporation is the customer but in which the principal shareholder of the corporation guarantees the loan and provides his principal residence as security for the loan.

The Truth in Lending Act and Regulation Z, which was promulgated by the Board to implement the Act, covers only credit which is granted for personal, family, household, or agricultaral purposes. Credit granted for business purposes is specifically exempted from Truth in Lending as provided in Section 104(1) of the Act and in Section 226.3(a) of Regulation Z. Therefore, if the transaction described in your letter is a credit transaction for business purposes, then that transaction would be exempt from the provisions of the Truth in Lending Act and Regulation Z, and no disclosures would need to be made to the guarantor nor would it be necessary to provide the guarantor with notice of right of rescission.

Very truly yours,

Kenneth A. Kenyon
Deputy Secretary

* * * *

No. 663

BUSINESS PURPOSE LOAN SECURED BY PERSON'S ANTIQUES
Sec. 226.2(k)
Sec. 226.3(a)

January 23, 1973

In your letter of January 11, 1973, you described a transaction and questioned whether it is subject to Truth in Lending's Regulation Z. You indicate that the loan transaction is for "commercial" purposes and the proceeds are intended to be used for the completion of construction of a building to be used in business. However, the loan is secured by antiques which are used for personal, family or household purposes and will be kept in the home of the borrower.

Section 226.3(a) of Regulation Z specifically exempts from coverage extensions of credit for business or commercial purposes, other than agricultural purposes. Consequently, if the purpose of the transaction is indeed a business or commercial purpose, the transaction would be exempt from the coverage of Truth in Lending, regardless of the property used to secure the obligation. The purpose of the transaction, not the security involved, is controlling in determining whether it is subject to Regulation Z.

Jerauld C. Kluckman
Accountant-Analyst

• • • •

No. 727

CREDIT CARDS ISSUED JOINTLY TO EMPLOYEE AND CORPORATION
Sec. 226.3(a)
Sec. 226.6(e)
Sec. 226.7(b)

November 13, 1973

Your note asked for suggestions in responding to the June 15, 1973, letter of relating to the agreement. The agreement provides that in the case of a "supplementary card" (a card issued to an employee of a company in his own name and in the name of the company) will bill only the employer, although both the employer and the employee are jointly and severally liable on all obligations incurred under the account. The question is whether § 226.7(b) of Regulation Z requires to send a periodic billing statement to the employee as well as to the employer.

The key question seems to be to whom credit is extended, and whether it is "consumer credit" as opposed to business credit. If credit is extended to the company, then the entire transaction is exempt from Truth in Lending under § 226.3(a). However, if credit is extended to the employee as well as the company, the question arises as to whether the credit is for business or commercial purposes, or whether it is primarily for personal, family, household, or agricultural purposes. If the credit is for business or commercial purposes, it would not be subject to Truth in Lending by virtue of the exemption in § 226.3(a). On the other hand, if the purpose of the credit is mixed but primarily for personal, family, household or agricultural purposes, the credit would be subject to Truth in Lending's provisions. However, we suspect tha

few cards, if any, which are issued with a corporation as a cardholder would fall within this category.

If the account does fall within the disclosure provisions of the Regulation, there would appear to be a single "customer" on the account since there is only one "natural person" (see § 226.2(o)) and the provisions of § 226.6(e) relating to multiple customers would not apply. In such cases, although the employee would be the nominal party entitled to disclosures, we believe that these disclosures could be sent to him within the requirements of § 226.7(b) by sending them to the company's address, since that address is apparently the address designated by the parties for delivery of the disclosures.

Griffith L. Garwood
Adviser

* * * *

No. 751

RESIDENCE GIVEN AS SECURITY FOR BUSINESS LOAN-EXEMPT
Sec. 226.3(a)
RESIDENCE GIVEN AS SECURITY FOR BUSINESS LOAN-EXEMPT FROM BOTH DISCLOSURE REQUIREMENTS AND RESCISSION RIGHTS OF REG. Z
Sec. 226.9(a)

January 14, 1974

This is in response to your letter of January 7, 1974, which questions the application of Regulation Z to a second mortgage taken on the home of a husband and wife to secure a loan taken by the husband exclusively for business purposes. You indicate that the husband and wife own their home as joint tenants with rights of survivorship, thereby requiring both signatures, if the

incumbrance against the home is to be valid. You question whether a copy of the Truth in Lending disclosure statement and two copies of the notice of the right of rescission need to be given to the couple.

It is staff's view that the credit transaction in question is not subject to Truth in Lending. Section 226.3(a) of Regulation Z specifically exempts from coverage extensions of credit for business or commercial purposes, other than agricultural purposes. Consequently, if the purpose of the transaction is indeed business or commercial, the transaction would be exempt from coverage, regardless of the nature of the title in the property used to secure the obligation. The purpose of the transaction, not the security involved, is controlling in determining whether it is subject to Regulation Z. Therefore, no Truth in Lending disclosures need be made.

Jerauld C. Kluckman
Chief
Truth in Lending Section

* * * *

No. 821

APPLICATION OF EXEMPTION AS TO TRANSACTIONS IN SECURITIES WITH AN SEC BROKER-DEALER
Sec. 226.3(a)
Sec. 226.3(b)

July 18, 1974

This is in response to your letter of June 4, inquiring whether the exemption provided under § 226.3(b) of Regulation Z is the only exemption available where a credit transaction involves securities.

The exemption provided under § 226.3(b) relates to transactions involving a specified type of creditor, a "broker-dealer registered with the Securities and Exchange Commission." Thus, where securities or commodity accounts are the subject of a credit transaction with a broker-dealer registered with the SEC, all such credit transactions are exempt by virtue of § 226.3(b). However, the exemptions under § 226.3(a) and (c) may also apply to other security credit transactions not eligible for exemption under § 226.3(b). For example, a credit transaction is considered to be for business or commercial purposes if credit to buy securities is extended to the individual in his business capacity as a merchant, in order to supplement the income of the business for business purposes. Likewise, a credit transaction of more than $25,000 to purchase securities would be exempt if the transaction is not secured by real property.

It is difficult to draw a clear line between credit for personal, family, household, or agricultural purposes and credit for business or commercial purposes where the obligor is a natural person. In situations where there is an element of doubt as to what course to follow, it would seem to be in a creditor's interest to err on the side of making unnecessary disclosures rather than risk the possible consequences of failing to make them.

Jerauld C. Kluckman
Chief
Truth in Lending Section

No. 1004

§ 226.3(a) Fair Credit Billing provisions do not apply to credit cards issued to corporation for business purposes but card issuer is subject to credit card provisions of §§ 13(a) through (h)

§ 226.13 " " " " "

§ 226.14(a)

§ 226.14(g)

February 10, 1976

This is in response to your letter of . . . , concerning the applicability of the Fair Credit Billing Act amendments of Regulation Z to issuers of credit cards to corporate cardholders. Because the definition of creditor in § 226.2(s) of Regulation Z includes card issuers for purposes of Fair Credit Billing and the definition of cardholder in § 226.2(m) includes a person holding a card issued for business or commercial purposes, you question whether the requirements of Fair Credit Billing apply to the card issuer in relation to these corporate cardholders.

From the information you provided, the credit card company, "card issuer," enters into a contract to provide credit cards to another company, "cardholder," for use by the cardholder's employees. The cards are embossed with the name of the cardholder company and the employee. The cards are used by the employees to purchase goods or services required for the performance of their job. The cardholder is liable for payment of the goods or services purchased with the card, and the employee is never sent an invoice or periodic statement.

It is the opinion of staff, based on the fact situation outlined, that the requirements of Fair Credit Billing do not apply to card issuers in relation to corporate cardholders using the cards for business or commercial pur-

poses. This is so in view of the exemption for credit extended to organizations for business or commercial purposes in § 226.3(a). However, as I am sure you are aware, there are certain special requirements contained in § 135 of the Act on the issuance of credit cards and on liability for unauthorized use which apply to cards used for business or commercial purposes. These provisions are implemented in § 226.13 of Regulation Z. In the opinion of staff, the requirements of § 226.13(a) through (h) would apply to the card issuer in this case. Enclosed is a copy of Public Information Letter 716, which deals with a card issuer and corporate cardholder in a similar situation to the one you described. I have included the letter for your information in the hope that it may answer certain questions you might have about the application of § 226.13(a) through (h).

D. Edwin Schmelzer
Acting Chief
Fair Credit Practices Section

* * * *

No. 80-202

FEB 26 1981
ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

JOINT APPENDIX

RONALD J. GREENE
JOHN B. MCNEECE III
JUDITH BAILEY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner

LOUIS R. KOERNER, JR.
1204 Jackson Avenue
New Orleans, Louisiana 70130
(504) 566-0546

Counsel for Respondent

Petition for Writ of Certiorari Filed August 11, 1980
Certiorari Granted on January 12, 1981

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I. Relevant Docket Entries

in

Louis R. Koerner, Sr., *et al.*

v.

American Express Company

No. 76-3660-D(3) (E.D. La.)

Date	Filings, Orders, and Proceedings
1976	
November 22	Plaintiff Louis R. Koerner, Sr. files Complaint (Reprinted herein at 15a-20a).
1977	
January 11	Defendant American Express files Motion for Summary Judgment (Reprinted herein at 23a-24a), Accompanied by Statement of Uncontested Facts (Reprinted herein at 25a-29a).
January 27	Motion for Summary Judgment is referred to United States Magistrate.
February 4	Plaintiff files Opposition to Defendant's Motion for Summary Judgment.
February 4	Plaintiff files Opposition to Defendant's Statement of Uncontested Facts (Reprinted herein at 30a-31a).
March 31	Defendant files Interrogatories to Plaintiff (Reprinted herein at 34a-39a).
May 9	Plaintiff files Answers to Interrogatories (Reprinted herein at 40a-44a).
May 12	Defendant files Supplemental Memorandum in Support of Motion for Summary Judgment.
June 1	Plaintiff files Reply to Defendant's Supplemental Memorandum
July 22	Entry of Order and Recommendation of United States Magistrate, recommending that Motion for Summary Judgment by Defendant be Granted (Reprinted herein at 45a-51a).

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Date	Filings, Orders, and Proceedings
1977	
August 3	Plaintiff files Memorandum in Opposition to Recommendation of the United States Magistrate.
August 16	Defendant files Memorandum in Support of Recommendation of the United States Magistrate.
December 8	Entry of Memorandum Opinion and Order by the District Court. Defendant's Motion for Summary Judgment is Granted (Reprinted in Appendix C to the Petition for Certiorari).
December 9	Entry of Judgment. Ordered that Judgment be in favor of Defendant American Express and against Plaintiff, dismissing Plaintiff's Complaint (Reprinted in Appendix D to the Petition for Certiorari).
December 19	Plaintiff files Motion to Alter or Amend the Judgment and/or for a New Trial.
December 30	Defendant files Memorandum in Opposition to Plaintiff's Motion to Alter or Amend the Judgment and/or for a New Trial.
1978	
January 4	Hearing. Motion of Plaintiff to Alter or Amend the Judgment—Denied; Motion of Plaintiff for New Trial—Denied.
January 4	Plaintiff files Notice of Appeal.

II. Relevant Docket Entries

in

Louis R. Koerner, Sr., *et al.*

v.

American Express Company

No. 78-1290 (5th Cir.)

Date	Filings, Orders, and Proceedings
1978	
January 4	Appellant Louis R. Koerner, Sr. files Notice of Appeal.
May 3	Appellant files Opening Brief.
June 30	Appellee American Express files Brief in Opposition to Opening Brief.
July 21	Appellant files Reply Brief.
1979	
December 10	Oral Argument.
1980	
April 7	Entry of Opinion and Judgment, Reversing and Remanding the Judgment to the District Court (Reprinted in Appendix A to the Petition for Certiorari).
April 21	Appellee files Motion for Rehearing en banc.
May 12	Entry of Order denying Motion for Rehearing en banc (Reprinted in Appendix B to the Petition for Certiorari).
May 20	Entry of Order directing Clerk to issue Mandate.
August 11	Appellee files Petition for Writ of Certiorari.
1981	
January 12	Entry of Order granting Petition for Writ of Certiorari (Reprinted herein at 55a).

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III. Appendices to the Petition for Writ of Certiorari

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The following Appendices to the Petition for Writ of Certiorari are incorporated herein by reference:

Appendix A—Opinion and Judgment of the Court of Appeals

Appendix B—Order of the Court of Appeals Denying Petition for Rehearing en Banc

Appendix C—Memorandum Opinion and Order of the District Court

Appendix D—Judgment of the District Court

Appendix E—Sections 104(1) and 161 of the Truth-in-Lending Act, 15 U.S.C. §§ 1603(1) and 1666 (1976)

Appendix F—Section 226.3(a) of Regulation Z, 12 C.F.R. § 226.3(a) (1980)

Appendix G—Federal Reserve Board Public Information Letters Pertaining to the "Business or Commercial Purpose" Exemption

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IV. Relevant Pleadings, Findings, Recommendations and Other Items from the Record

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No.

SECTION: " "

LOUIS R. KOERNER, SR., Individually and on behalf of all others similarly situated

versus

THE AMERICAN EXPRESS COMPANY

COMPLAINT FOR DAMAGES
JURY DEMAND
CLASS ACTION

JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked pursuant to the provisions of 28 USC Secs. 1331, 1332, and 1337, together with the provisions of 15 USC 1640(e). The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

2. The wrongful acts which are described hereinafter have been in whole or in part conceived, carried out, and made effective in the Eastern District of Louisiana, and many of the injurious acts pursuant thereto have been performed in this district. Defendant transacts business in this district.

NATURE OF THE PROCEEDINGS

3. This is a civil action brought by the plaintiff on his own behalf and on behalf of others similarly situated for damages and for injunctive and equitable relief. Plain-

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tiff further seeks relief against the continuation of the pattern of deliberate violations of the provisions of 15 USC 1666, and of retaliation against cardholders who seek in good faith to utilize the provisions of 15 USC 1666 and of other users and would-be users of this provision. This proceeding is also to recover monetary damages, compensatory and punitive, and the attorney's fees necessary for the prosecution of this case from the named defendant for violations of the rights provided by Chapter 41 of Title 15 of the United States Code to plaintiff and the members of the classes. Plaintiff also seeks damages pursuant to Louisiana law for breach of contract and for damages caused by delict.

4. Plaintiffs seek injunctive relief requiring defendant to terminate with regard to the plaintiff and the members of the class its continued violations of the aforesaid laws, in depriving the class plaintiff of his right to utilize these provisions of law.

DESCRIPTION OF THE PARTIES

5. Plaintiff is a citizen of the State of Louisiana.

6. Defendant is a corporation organized under the laws of a state other than Louisiana, and with its principal place of business in a state other than Louisiana.

CLASS ACTION

7. Plaintiff brings this action on behalf of himself and as representative of and for and on behalf of all others similarly situated, to wit: persons and organizations who are cardholders of the defendant and who wish to use, now and in the future, the provisions of 15 USC 1666. Plaintiff brings this action on behalf of the subclass of cardholders who in attempting to utilize the provisions of 15 USC 1666 have been caused injury by violations by the defendant of the provisions of that statute.

8. This class action is brought pursuant to Rule 23 (a), b(1, 2, and 3) of the Federal Rules of Civil Procedure. The classes set forth above are geographically diverse, and the classes are so numerous that joinder of all members is impracticable; that the questions of law and fact, as set forth hereinafter, are common to the members of the class; that these questions are typical of the claims of the class, and plaintiff will fairly and adequately represent the interests of the various classes. The defendant has acted and is continuing to act on grounds generally applicable to the members of the class, thus making appropriate final injunctive relief or declaratory relief with respect to the class as a whole.

GENERAL STATEMENT

9. Plaintiff, through John R. Koerner Company, Inc., of which he is an officer, has been a cardholder of defendant American Express Company since 1965, with a present account number of 029 004 084 9 101AX.

10. There has been a dispute regarding the account since approximately April of 1975 concerning automatic billings for flight insurance and concerning renewal charges for two other company cards which were specifically not renewed. The amount in dispute totals some $55.00.

11. Defendant has been notified on many occasions of the billing errors, and in fact acknowledged the unauthorized nature of the automatic insurance coverage, that last notification having taken place by letter dated August 10, 1976. Copies of that letter and of prior correspondence is annexed as Exhibit A.

12. Plaintiff was scheduled to fly from New Orleans to San Antonio aboard Eastern Flight #554 on September 28, 1976 departing at 12:54 P.M., and in accordance with Eastern's suggestion, arrived at New Orleans In-

ternational Airport at around 11:15 A.M. on that date to pick up the ticket.

13. Upon presentation of the defendant's card, the ticket agent disappeared and returned at approximately 11:30 A.M. to request that plaintiff talk by telephone to a Mrs. O'Shay of the Phoenix office of defendant. The credit cards were to be withdrawn on account of alleged delinquency. Plaintiff used another credit card to purchase his ticket, but was refused the return of the said credit card, whereupon after another discussion with Mrs. O'Shay, plaintiff obtained the return of the card cut in half.

14. At this point, it was within five minutes of flight time, and plaintiff had to rush to make the flight, because no subsequent flight would have permitted him to make the dinner appointments which had previously been arranged.

15. Plaintiff is informed and believes and upon such information and belief alleges that the reason for the cancellation of the utilization of defendant's card was in retaliation for the refusal of plaintiff to capitulate to payment of unauthorized charges and the making of the many complaints to defendant in an attempt to rectify the continuing billing errors.

16. Plaintiff is further informed and believes and upon such information and belief alleges that this is a general practice of the defendant, and that it has been continued, despite the prohibition specifically set forth by 15 USC 1666, to the detriment of the class member cardholders, either through the result of being forced to make payments for disputed items or on account of the revocation of the utilization of the card in a situation such as that set forth hereinabove. The basis for such information and belief is the conduct of the defendant in failing to comply with this statutory enactment for a

period of over one year, and the attitude of defendant's agent, Mrs. O'Shay, which indicated that this conduct by the defendant was a part of a general course of action taken by the defendant in such circumstances of alleged billing errors.

VIOLATIONS OF CONSUMER CREDIT PROTECTION LAW

17. The actions of the defendant constituted specific violations of the provisions of 15 USC 1637 as made applicable by 15 USC 1666 in that it caused the revocation of the said credit card despite notification of the billing error and without compliance on the part of the defendant of its obligations under the said 15 USC 1666 et seq. to explain the alleged billing error.

18. The said violations and the pattern of violative conduct result in civil liability under 15 USC 1640 for the failure to disclose, plus a reasonable attorney fee, as well as for the civil penalty set forth in 15 USC 1666(e).

VIOLATIONS OF LOUISIANA LAW

19. The actions of defendants, as set forth in detail hereinabove, acting individually and in concert constitute unfair and deceptive acts and practices in the conduct of trade and commerce, and are accordingly unlawful and in violation of L.S.A.R.S. 51:1405, et seq.

20. The actions of defendants, as set forth hereinabove, constitute violations of the laws of Louisiana regarding the contractual obligations which issuers of credit cards undertake with regard to the classes to conduct their business a manner so that plaintiff and the class could utilize their cards without the threat of unauthorized withdrawal thereof.

21. The actions of the defendant, its agents and employees, constitute violations of the provisions of the Louisiana Civil Code, Articles 2315-2316 thereof in that the said actions whether intentional or negligent have caused damage to plaintiffs and the members of the class to whom defendant owed a duty to refrain from such activity with regard to the use of the said card.

DAMAGES AND OTHER RELIEF SOUGHT

22. As a result of the activities complained of herein, plaintiff has suffered actual damages, including inconvenience, mental anguish, grief, aggravation, and humiliation; that plaintiff has a heart condition and fears that aggravation caused by the activities of the defendant will result or has resulted either in a heart attack or in a deterioration of his heart condition.

23. Plaintiff does not know the full extent of the damages, but believes that each individual plaintiff class member has suffered damages and that the members of the subclass who have had the same experience of unlawful withdrawal of the use of the card under the same circumstances have also suffered damages in excess of $10,000.00, and that many have suffered far greater damages because of the conduct of the defendants in preventing certain class members from being able to use their cards and having such cards taken away under the most embarrassing and humiliating conditions. The members of the class are all entitled to damages in accordance with the provision of Chapter 41 of Title 15 USC. At such time as plaintiff and the members of the classes have ascertained more clearly the extent of damages, they will seek leave to amend to specifically set such damages forth.

24. Pursuant to the provisions of the Consumer Credit Protection Laws, plaintiff is entitled to, after due proceedings, a permanent injunction enjoining the defendants,

and those working on behalf or in concert with them from continuing violations of such laws.

JURY TRIAL

25. Plaintiff demands trial by jury on all issues properly so triable.

WHEREFORE, plaintiff demands judgement declaring that the defendant is in violation of the Consumer Credit Protection laws and for judgment in the amount of $25,000.00 actual damages for himself and such damages as may be due to each of the subclass members, plus damages for the entire class in accordance with the Consumer Credit Protection Act, plus reasonable attorney's fees, that on injunction be issued restraining further violations of the Consumer Protection Act by defendant, for trial by jury, and for all just and equitable relief.

Dated: 10/3/76

KOERNER, BABST & LAMBERT
A Professional Law
Corporation

By: _____

LOUIS R. KOERNER, JR.
730 Camp Street
New Orleans, La. 70130
(504) 581-9569

VERIFICATION

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared: Louis R. Koerner, Sr., who being duly sworn, did depose and say that he is the plaintiff

herein; that he has read the allegations of the complaint, and all of the facts contained therein are true and correct to the best of his knowledge, information, and belief; that affiant is informed and believes that the allegations made upon information and belief are true, and that the sources of the knowledge from which the information and belief are drawn are correspondence between his company and defendant and his conversation with Mrs. O'Shay of American Express Company.

Sworn to and subscribed before me, this — day of ————, 1976

LOUIS R. KOERNER, SR.

Notary Public

Please Serve:

THE AMERICAN EXPRESS COMPANY
Through CT Corporation
1300 Hibernia Bank Bldg.
New Orleans, La. 70112

[The complaint as filed with the District Court did not contain a copy of Exhibit A].

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION "D"

LOUIS R. KOERNER, SR.,
Plaintiff

versus

THE AMERICAN EXPRESS COMPANY,
Defendant

Filed: _____ _____
Deputy Clerk

MOTION FOR SUMMARY JUDGMENT

Defendant, The American Express Company, moves this honorable Court for an Order granting summary judgment dismissing this matter on the grounds that Louis R. Koerner, Sr. was a cardholder under a corporate company account and was not a consumer as used in the Trust in Lending Act [sic] and used his American Express card primarily for business purposes and not "primarily for personal, family, household, or agricultural purposes". And on the further ground that the alleged violations of Louisiana law do not reach the jurisdictional minimum amount of TEN THOUSAND AND NO/100 ($10,000) DOLLARS.

CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY

BY /s/ Frank Liberto
PETER FRANK LIBERTO
Attorneys for
American Express Company
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: (504) 568-1320

CERTIFICATE

I hereby certify that a copy of the above and foregoing pleading has been this day forwarded to all counsel of record by depositing a copy thereof, postage prepaid, in the United States mail on this 11 day of Jan. 1977.

CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY

By: /s/ Frank Liberto

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION "D"

LOUIS R. KOERNER, SR.,
Plaintiff

versus

THE AMERICAN EXPRESS COMPANY,
Defendant

Filed: _____ _____
Deputy Clerk

STATEMENT OF UNCONTESTED
MATERIAL FACTS

1.

On or about November 16, 1965 The John E. Koerner and Company, Inc. corporation made application for a company account American Express card, a copy of which application is attached as Exhibit 1.

2.

On or about November 16, 1965 Louis R. Koerner made application for a supplementary credit card on the company account in the name of Louis R. Koerner. The application for the supplementary credit card of the company account is attached as Exhibit 2.

3.

All of the billing was to The John E. Koerner Company as a business account. The documents which show this are attached as Exhibit 3.

4.

The same documents indicate that most of the charges were for hotels, airlines, and rent-a-cars, items used primarily in business transactions.

5.

The account of Louis R. Koerner, Sr., was a commercial or business account and was billed to John E. Koerner and Company, Inc.

6.

The amount in dispute as alleged in paragraph 10 of the Complaint is FIFTY-FIVE AND NO/100 ($55.00) DOLLARS.

7.

No special damages have been alleged in the Complaint.

CHAFFE, MCCALL PHILLIPS,
TOLER & SARPY

BY /s/ Frank Liberto
PETER FRANK LIBERTO
Attorneys for The American
Express Company
1500 First N.B.C. Building
New Orleans, Louisiana

39

Please type or print information and mail this form to American Express Company, P. O. Box 1855, Church Street Station, New York 8, N. Y.

American Express

APPLICATION FOR CREDIT CARD | COMPANY ACCOUNT

IT IS NOT NECESSARY TO SEND THE ANNUAL FEE OF $10.00. WE WILL BILL YOU FOR THIS AMOUNT UPON ISSUANCE OF THE CARD.

B1

COMPANY NAME JOHN E. KOERNER & CO., INC. TELEPHONE 525-2903

MAIN OFFICE ADDRESS 740 MAGNOLIA STREET (Street) NEW ORLEANS (City) 70150 (Zone) LOUISIANA (State)

NATURE OF BUSINESS WHOLESALE FLOUR JOBBERS YEARS ESTABLISHED 1907

IF BILLING IS TO GO TO A BUSINESS ADDRESS OTHER THAN MAIN OFFICE ADDRESS PLEASE SPECIFY

ADDRESS (Street) (City) (Zone) (State or Country)

DOES YOUR COMPANY NOW HOLD ☐ HAVE YOU PREVIOUSLY APPLIED FOR ☐ OR HAVE YOU PREVIOUSLY HELD ☐ AN AMERICAN EXPRESS CREDIT CARD

ACCOUNT NUMBER

COMPANY BANK REFERENCE (BE SURE TO INCLUDE STREET ADDRESS)

BANK WHITNEY NATIONAL BANK STREET ADDRESS P. O. BOX 61260 CITY & STATE NEW ORLEANS, LA.

BANK HIBERNIA NATIONAL STREET ADDRESS CARONDELET & GRAVIER CITY & STATE NEW ORLEANS, LA.

CREDIT REFERENCES (SHOW NAME AND ADDRESS) INTERNATIONAL MILLING CO., GREENVILLE, TEXAS

RODNEY MILLING CO., 1550 WEST 29th. ST., KANSAS CITY, MO. 64108

INDIVIDUAL AUTHORIZED TO RECEIVE AN AMERICAN EXPRESS CREDIT CARD IN COMPANY'S NAME

SC1 KCEP 09 135 4084 5

Leave above spaces blank (For Office Use Only)

NAME JOHN (First) E (Middle) KOERNER, JR. (Last) AGE 57 SPOUSE'S NAME Katherine (First Name)

HOME ADDRESS 3609 STATE ST. DRIVE, N. O. (Street) (City) 70125 (Zone) LOUISIANA (State or Country)

TELEPHONE UN. 6-2613 YEARS AT ADDRESS 35 YRS POSITION IN COMPANY PRESIDENT ANNUAL EARNINGS

The undersigned individual and company join in this application and assume joint and several liability for all charges incurred prior to return of Credit Card(s) issued pursuant hereto. The undersigned agree(s) to the terms and conditions accompanying the Credit Card, if this application is accepted and a Credit Card issued.

CARD ISSUED

SIGNATURE OF INDIVIDUAL APPLICANT Jno. E. Koerner Jr. DATE 11/23 11/16/65

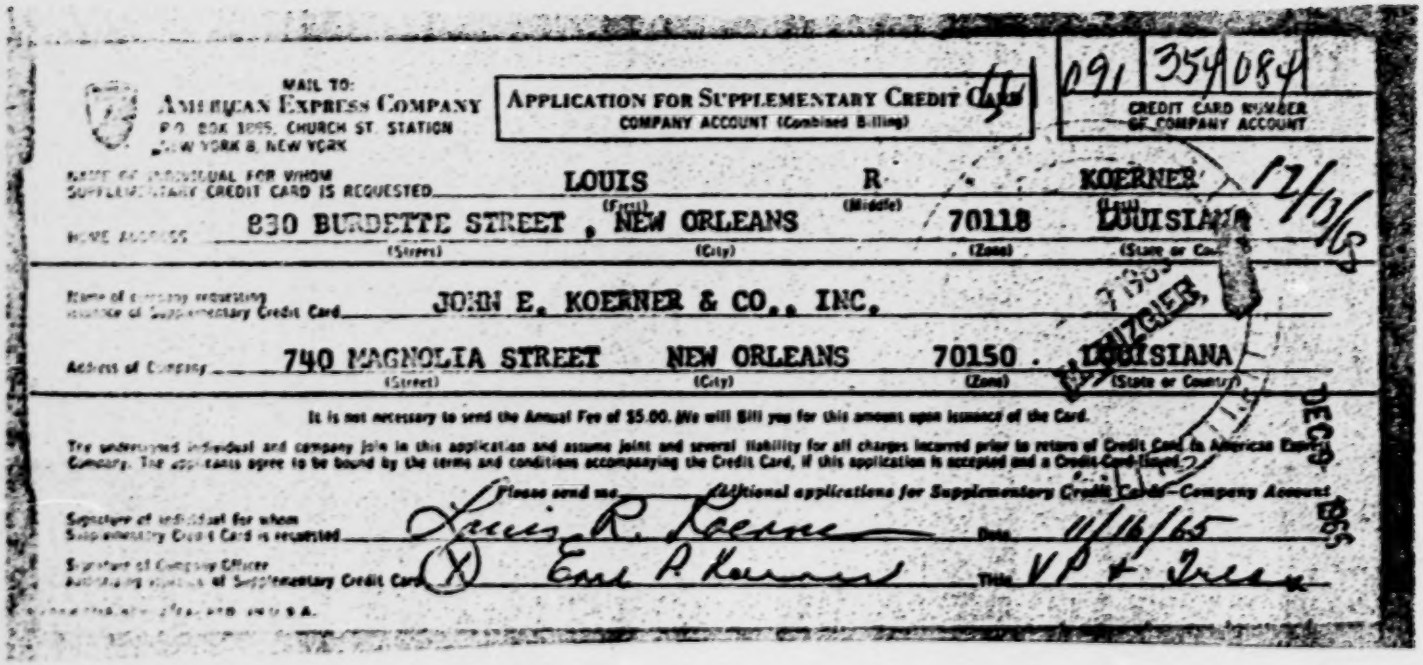
COMPANY ACCOUNT AUTHORIZATION DEC 1 1965 Earl P. Koerner V.P. & Treas. Signature of Authorizing Officer Title

21

Please send me _____ additional applications for Supplementary Credit Cards—Company Account

EXHIBIT 1

27a



MAIL TO:
AMERICAN EXPRESS COMPANY
P.O. BOX 1595, CHURCH ST. STATION
NEW YORK 8, NEW YORK

APPLICATION FOR SUPPLEMENTARY CREDIT CARD
COMPANY ACCOUNT (Combined Billing)

091 354084
CREDIT CARD NUMBER OF COMPANY ACCOUNT

NAME OF INDIVIDUAL FOR WHOM SUPPLEMENTARY CREDIT CARD IS REQUESTED: LOUIS (First) R (Middle) KOERNER (Last)

HOME ADDRESS: 830 BURDETTE STREET (Street), NEW ORLEANS (City) 70118 (Zone) LOUISIANA (State or Co...)

12/15/65

Name of Company requesting issuance of Supplementary Credit Card: JOHN E. KOERNER & CO., INC.

Address of Company: 740 MAGNOLIA STREET (Street) NEW ORLEANS (City) 70150 (Zone) LOUISIANA (State or Country)

It is not necessary to send the Annual Fee of $5.00. We will Bill you for this amount upon issuance of the Card.

The undersigned individual and company join in this application and assume joint and several liability for all charges incurred prior to return of Credit Card to American Express Company. The applicants agree to be bound by the terms and conditions accompanying the Credit Card, if this application is accepted and a Credit Card issued.

Please send me ____ additional applications for Supplementary Credit Cards—Company Account

Signature of individual for whom Supplementary Credit Card is requested: Louis R. Koerner Date: 11/16/65

Signature of Company Officer Authorizing Issuance of Supplementary Credit Card: (X) Earl A. Kerner Title: VP & Treas.

DEC 8 1965

EXHIBIT 2

[Exhibit 3 is not included in the Joint Appendix.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION "D"

LOUIS R. KOERNER, SR.,
Plaintiff

versus

THE AMERICAN EXPRESS COMPANY,
Defendant

OPPOSITION TO STATEMENT OF UNCONTESTED MATERIAL FACTS

1. Admitted.

2. Admitted.

3. Admitted.

4. Denied. Plaintiff does not know what is meant by the phrase "most of the charges" indicates, and further states that since there has been no discovery to establish what each charge was for, the statement is a mere conclusion.

5. Denied. This is a conclusion of law which is at issue between the parties.

6. Denied. The amount in dispute is set forth in the prayer of plaintiff's petition, $25,000.00 actual damages for himself and such damages as may be due to each of the sub-class members, plus damages for the entire class in accordance with the Consumer Credit Protection Act.

7. Denied. Plaintiff does not understand what defendant means by "special damages".

Further, it is plaintiff's position that the material facts as set forth in defendant's statement, as will be shown, in the memorandum submitted herewith, is not complete.

KOERNER & LAMBERT
A Professional Law Corporation

BY: _____

STEPHEN M. BERNSTEIN
730 Camp Street
New Orleans, Louisiana 70130
581-9569

CERTIFICATE

I HEREBY CERTIFY That a copy of the foregoing statement has been sent to counsel for all interested parties, by placing same in the United States mail, postage prepaid, properly addressed, this — day of ———, 1977.

_____

STEPHEN M. BERNSTEIN

MINUTE ENTRY
HUGHES, M.
MARCH 30, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION D

LOUIS R. KOERNER, SR.

versus

THE AMERICAN EXPRESS COMPANY

A conference in this matter was held on March 30, 1977. The following counsel attended:

Louis R. Koerner, Jr., Esq. 581-9569
Attorney for plaintiff

Peter Frank Liberto, Esq. 568-1320
Attorney for defendant

A—It was stipulated by plaintiff that the specific purpose of the trip which gives rise to the specific instance bringing about this action was a business trip.

B—Mr. Koerner also stipulates that plaintiff has not sought specific medical attention and that any aggravation of plaintiff's heart condition is at present indeterminable, and further that that claim would not reach judicial amounts and that except for pendant jurisdiction in the Truth and Lending matter, the federal court would not otherwise have jurisdiction of that claim.

C—Due to a misunderstanding on the part of the defendant, no formal discovery was entered into.

D—Discovery will now be entered into as limited by previous Minute Entry.

Further *conference* will be *held* before Magistrate Hughes on Wednesday, *April 27, 1977, at 2:30 P.M.*

/s/ Kenneth C. Hughes
KENNETH C. HUGHES
United States Magistrate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION "D"

LOUIS R. KOERNER, SR.

vs.

THE AMERICAN EXPRESS COMPANY

Filed: _____ _____
Deputy Clerk

INTERROGATORIES

INTERROGATORY 1

With respect to named plaintiff's trip from New Orleans to San Antonio on Eastern Flight No. 554 on September 28, 1976, the day the American Express card was withdrawn, please state:

a. Whether said trip was conducted for business purposes.

b. Whether said trip was entered as a business expense for purposes of income tax.

c. Who bore the expense of that air fare.

d. Whether said air fare was charged to any client or business account.

INTERROGATORY 2

Since the above incident occurred on September 28, 1976, a Tuesday approximately at noon, state whether named plaintiff was acting during the course of his work

day or whether named plaintiff was on leave from work for personal reasons.

INTERROGATORY 3

With respect to the dispute regarding the amount alleged in paragraph 10 of the complaint totaling some $55.00, list:

a. Each transaction involving only named plaintiff's expenses which were incurred in leading to his part of the $55.00 dispute.

b. With respect to each transaction listed in response to part "a" of this interrogatory, state whether each transaction was for business purposes or personal consumer purposes.

INTERROGATORY 4

With respect to the $3.00 debit included in the billing for July 29, 1975 (encircled on Exhibit 1-a) for air flight insurance for a Delta flight for which a ticket was issued July 7, 1975, in the amount of $83.10 (American Express document encircled identifying the purchase on Exhibit 1-b), please state:

a. Whether said trip was conducted for business purposes.

b. Whether said trip was entered as a business expense for purposes of income tax.

c. Who bore the expense of that air fare.

d. Whether said air fare was charged to any client or business account.

INTERROGATORY 5

With respect to the $3.00 debit included in the billing for August 26, 1975 (encircled on Exhibit 2-a) for air

flight insurance for a Delta flight for which a ticket was issued August 4, 1975 in the amount of $46.74 (American Express document encircled identifying the purchase on Exhibit 2-b), please state:

a. Whether said trip was conducted for business purposes.

b. Whether said trip was entered as a business expense for purposes of income tax.

c. Who bore the expense of that air fare.

d. Whether said air fare was charged to any client or business account.

INTERROGATORY 6

With respect to the $3.00 debit included in the billing for September 25, 1975 (encircled on Exhibit 3-a) for air flight insurance for a Delta flight for which a ticket was issued September 9, 1975 in the amount of $46.74 (American Express document encircled identifying the purchase on Exhibit 3-b), please state:

a. Whether said trip was conducted for business purposes.

b. Whether said trip was entered as a business expense for purposes of income tax.

c. Who bore the expense of that air fare.

d. Whether said air fare was charged to any client or business account.

INTERROGATORY 7

With respect to the $3.00 debit included in the billing for October 28, 1975 (encircled on Exhibit 4-a) for air flight insurance for a Texas International flight for which a ticket was issued on October 3, 1975 in the

amount of $41.37 (American Express document encircled identifying the purchase on Exhibit 4-b), please state:

a. Whether said trip was conducted for business purposes.

b. Whether said trip was entered as a business expense for purposes of income tax.

c. Who bore the expense of that air fare.

d. Whether said air fare was charged to any client or business account.

INTERROGATORY 8

With respect to the four $3.00 debits for flight insurance in conjunction with transactions of named plaintiff (listed in Interrogatories 4-7), please state:

a. Which of the above four transactions contributed to the $55.00 billing dispute as alleged in paragraph 10 of the complaint.

b. List each and every additional transaction of named plaintiff which contributed to the $55.00 billing dispute as alleged in paragraph 10 of the complaint.

c. State as to each transaction listed in response to part "b" of this interrogatory whether it was for commercial or business purposes or for non-business purposes.

INTERROGATORY 9

With respect to each personal check of named plaintiff in payment for transactions with American Express, state:

a. The identity of the transaction or transactions which each payment covered.

b. List all documents supporting the personal nature (as opposed to business purposes) of each above transaction.

INTERROGATORY 10

With respect to the correspondence written to the American Express Company concerning the billing dispute alleged herein, state:

a. Whether all but one letter written to American Express was written on John F. Koerner and Company paper.

b. Whether all but one letter was written over the name of Mrs. L. Thomas, who is the bookkeeper for John F. Koerner and Company.

Respectfully submitted,

CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY

BY: /s/ Frank Liberto
PETER FRANK LIBERTO
Attorneys for
American Express
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: 568-1320

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 31st day of March, 1977, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Frank Liberto

[The Exhibits referred to in the Interrogatories are not included in this Joint Appendix.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION "D"

LOUIS R. KOERNER, SR.

VS.

THE AMERICAN EXPRESS COMPANY

ANSWERS TO INTERROGATORIES

INTERROGATORY 1

a. The trip was conducted for business purposes solely.

b. The trip was entered as a business expense for purposes of income tax.

c. John E. Koerner & Company, Inc. bore the expense of that air fare.

d. The air fare was charged on John E. Koerner Company Bank Americard and not charged to any other client or business account.

INTERROGATORY 2

On Tuesday, approximately at noon, I was acting during the course of my work and was not on leave from for any personal reasons.

INTERROGATORY 3

On July 29, 1975, a $3.00 charge for insurance.

On August 25, 1975, there was another $3.00 charge.

On September 25, there was a $6.00 charge, however, there was a $3.00 credit for this amount which leaves a balance of $3.00 on September 25th.

On October 28th, there was $6.00 charge.

On December 23rd, there was a $20.00 charge for Mr. John E. Koerner's card which was returned and for which no credit was ever given.

On August 26th, I deducted an error, which was a $20.00 charge for a card of Ralph E. Koerner. They gave me credit for this card and when I paid the bill, I deducted another $20.00. In other words, I took the credit twice, which was my error. On November 26, 1976, we were given credit which left a balance of $55.00. The last statement which we received shows a $55.00 balance that we owe. So on November 26, instead of crediting our cards with $65.00, they just credited it, I never did send them a check, they credited us for $54.45 which leaves a balance of $.55, and we have received no further statements.

INTERROGATORY 4

a. The trip was conducted for business purposes.

b. The trip was entered as a business expense for purposes of income tax.

c. John E. Koerner Company, Inc. bore the expense of that air fare.

d. The said air fare was not charged to client or business account and was solely paid for by John E. Koerner Co., Inc.

INTERROGATORY 5

Same as the answer to Interrogatory No. 4.

INTERROGATORY 6

Same as the answer to Interrogatory No. 4.

INTERROGATORY 7

Same as the answer to Interrogatory No. 4.

INTERROGATORY 8

Please see the answer to Interrogatory No. 3.

Further answer to Interrogatory No. 8, on July 29th, there was a $3.00 charge.

On September 25th, there was a $6.00 charge, $3.00 of which was credited.

On October 28th, there was a $6.00 charge.

Each trip was for business purposes only.

INTERROGATORY 9

The check of September 12, 1972, was for dinner for my wife and I at the Mariot Hotel.

The check for June 4, 1973, I have no record of what it covered.

The check for May 13, 1975, for $22.00, I have no record of what it covered.

The check of September 12, 1975, covered personal expenses including air fare and some meals in connection with taking my daughter to a business convention. It also covered her air fare.

The check of April 8, 1976, covered a purchase at Abacrombe and Fitch of $37.28 and air fair to Houston, Texas for my wife and I to attend my sister's funeral.

The check of September 2, 1976, covered the purchase of shirts at McKabb Department Store.

The check of January 6, 1976, to the best of my memory covered purchases made in Shannon Airport while I was on a vacation.

INTERROGATORY 10

To the best of my knowledgment, all letters were written on John E. Koerner and Company stationery with the exceptions of those letters which may have been written by my attorneys.

KOERNER & LAMBERT
A Professional L..w Corporation

/s/ Stephen M. Bernstein
STEPHEN M. BERNSTEIN
730 Camp Street
New Orleans, Louisiana 70130
(581-9569)

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, The undersigned authority, personally came and appeared Louis R. Koerner, Sr. who, after being first duly sworn did depose and say that the above answers are true and correct to the best of his ability, knowledge and belief.

/s/ Louis R. Koerner, Sr.
LOUIS R. KOERNER, SR.

Sworn to and subscribed to this 4th day of May, 1977.

/s/ [Illegible]
Notary Public

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing answers to interrogatories have been delivered to opposing counsel by hand this 3rd day of May, 1977.

/s/ Stephen M. Bernstein
STEPHEN M. BERNSTEIN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3660

SECTION D

LOUIS R. KOERNER, SR.

versus

THE AMERICAN EXPRESS COMPANY

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

This matter has been referred to me as United States Magistrate for Report and Recommendation under provisions of 28 U.S.C. § 636(b)(1)(B) as a Motion for Summary Judgment.

Other motions have been filed by the parties including a motion to defer determination of defendant's motion to dismiss and for summary judgment until completion of discovery. By the making of this Report, we suggest denying that motion.

This action is a complaint for damages with a request for jury trial. It is presented as a class action based upon the provision of 15 U.S.C. § 1601, *et seq.*, known as the Truth in Lending Act. Jurisdiction is also alleged under 28 U.S.C. § 1332, diversity of citizenship. Petitioner is a resident of Louisiana, and THE AMERICAN EXPRESS COMPANY is a foreign corporation. Petitioner alleges the diversity action will exceed the amount of $10,000.

The argument of counsel was heard on February 9, 1977, on the Motion for Summary Judgment.

The first issue is the application of the Truth in Lending Act. Mover-defendant AMERICAN EXPRESS argues that provisions of the Truth in Lending Act do not apply in this instance because it was not designed to apply to business or governmental credit. He cites the provisions of Regulation Z and the exempted transactions of subsection 226.3, which states:

> "This part does not apply to the following: (a) business or governmental credit. Extensions of credit to organizations including governments, or for business or commercial purposes, other than agricultural purposes."

The credit application states specifically that the application for credit card is for company account and it is to be issued "in company's name". AMERICAN EXPRESS argues that the mere fact that the application was made for a company account and was to be issued to a company, specifically John E. Koerner and Company, all the transactions made for that account are excluded. Petitioner, KOERNER, argues that the exemption is too broad and applies only where the use of the account is for specific business purposes. [Regulation "Z" covering this interpretation is 15 United States Code 1603.]

The following issues are not in contest:

1—Credit card was issued as a business credit card;

2—It was used by Mr. Koerner, who is president of the cardholding company;

3—The issuance of a supplemental card to Mr. Koerner personally was a supplement to the card issued by THE AMERICAN EXPRESS COMPANY.

If the issue turns on the use to which the card is put regardless of the user's identity, then the matter will

be determined by the facts of the case and whether they are applicable to the provisions of Truth in Lending Act.

Following the original hearing, this Court determined that certain stipulations should be entered into and, if necessary, limited to discovery.

Plaintiff stipulated that the purpose of the trip which gave rise to the incident was a business trip, not a pleasure trip. He further stipulated that the tort claim does not reach the jurisdictional amount. The answers to interrogatories support those stipulations. [See exhibits attached.]

The court in *Kenney* v. *Landis Financial Group, Inc.*, 376 F.Supp. 852, (N.D. Iowa, Cedar Rapids Division, 1974), CCH Consumer Credit Guide ¶ 98, 788, denied jurisdiction to petitioner's claim under the Truth in Lending Act. The court said:

> "On the basis of these facts, and from reviewing the entire record, it is the court's view that plaintiff has failed to establish by a preponderance of the evidence that the *transaction* in question was a consumer credit transaction and not one for business or commercial purposes. Accordingly, this action must be dismissed for lack of jurisdiction and all summary judgments heretofore entered should be vacated." (emphasis ours)
>
> *Kenney* v. *Landis*, 376 F.Supp. 853-854

Obviously what that court used as a criterion in its determination was the purpose for which the money was being borrowed by Kenney, not whether Kenney was in fact a business man. Further, the editorial preface to the opinion in CCH states clearly that the United States District Court refused to sustain an action for alleged Truth in Lending violations of the disclosure requirements for prepayments, rebates and delinquency charges

because the court had no jurisdiction over a *transaction that was intended for a business or commercial purpose*, rather than for personal, family or household *purposes*. It would then appear that the intent is the criterion. While not referring to this issue specifically, the court in *Thomas* v. *Meyers-Dickson Furniture Co.*, 479 F.2d 740, 5 Cir. 1973, stated: ". . . We deem it sufficient to iterate that 'exceptions' not mentioned in the Act should not be read into it", in referring to the Truth in Lending Act.

In apparent support of this position, the Tenth Circuit in *Redhouse* v. *Quality Ford Sales, Inc.*, 511 F.2d 230 (1975), stated:

> "There was an unresolved question as to whether Redhouse purchased his pick-up for personal use or for business use (and therefore exempt from the Act)."

The court went on to say:

> "In answer to the acknowledgment that if the Redhouse truck was purchased for business it would be outside the Act, the trial court noted:
>
> > It sounds to me as though you have an issue of fact . . ."

Further in the same ruling, the court feels obliged to state:

> "Redhouse submitted an affidavit that he intended to and did use the vehicle for personal, family and household needs. Defendant relied on the affidavit of a salesman which is not in the record but which is said to allege that Redhouse told the car salesman he wanted the truck for his work. Defendant Redd offered to testify to the statement, but this was excluded as hearsay because Redhouse does not speak English and the alleged statement was made through an interpreter who was not called as a witness."

The whole issue of whether the vehicle was for personal or business *use* appears to have impressed the court.

The Tenth Circuit in a rehearing *en banc* did not disturb this position (523 F.2d 1).[1]

In *Adema* v. *Great Northern Development Co.*, 374 Supp. 318, 1873, N.D. Ga., the court notes at length:

> "Alternatively, the complaint seeks relief under the provisions of the Consumers Credit Protection Act (Truth in Lending Act), 15 U.S.C. § 1601 et seq. The Act does not apply to credit extensions 'for business or commercial purposes'. 15 U.S.C. § 1603(1). By the plaintiff's own admission (Adema Dep. at pp. 42, 152, 161), the Treasure Lake lots he purchased were for investment purposes and not for personal use. Consequently, he would not be a consumer within the meaning of the Act. In defining the word 'consumer', 15 U.S.C. § 1602(h) provides:
>
> > The adjective 'consumer', used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes."

Mover in his memorandum cites *Sapenter* v. *Dreyco, Inc.*, 362 F.Supp. 871, (E.D. La. 1971), aff'd 450 F.2d

---

[1] The Fifth Circuit quoted *Redhouse* approvingly on the issue of summary judgment, stating:

> "We are fully cognizant that summary judgment is drastic relief which must be applied with caution and that the pleadings of the party opposing it are to be liberally construed."

Solomon v. *Houston Corrugated Box Co., Inc.*, 526 F.2d 389, 1976.

941 (5th Cir. 1971), cert. denied 406 U.S. 920, 92 S.Ct. 1775, 32 L.Ed.2d 120 (1972), in which Judge Cassibry states:

> "The Truth-in-Lending Act exemption of credit transactions 'for business or commercial purposes' does not distinguish between full time and part time businesses. Furthermore, the Truth-in-Lending Act was enacted as part of the Consumer Credit Protection Act of 1968, and specifically deals only with consumer credit transactions, characterized as 'one in which the party to whom credit is offered or extended is a natural person, and the money, property or services which are the subject of the transaction are primarily for personal, family, household or agricultural purposes.' "
>
> At p. 873

The Court states further:

> "This argument overlooks, however, the facts that 15 USC Section 1603(1) exempts all '[c]redit transactions involving extensions of credit for business or commercial purposes' from coverage of the Truth-in-Lending Act. In determining whether a particular transaction is exempt, therefore, the purpose of the transaction or extension of credit is controlling, not the property on which the security interest is retained. Thus, in the instant case, the extension of credit is for a business purpose and Section 1635 (a) is of no avail to plaintiffs even though the mortgage was placed on their residence."
>
> At p. 874.

I find plaintiff's transactions with defendant were of a business or commercial nature and not personal. Plaintiff does not have a cause of action pursuant to 15 U.S.C. § 1601 *et seq.* The tort action falls for lack of jurisdictional amount under 28 U.S.C. § 1332.

Recommendation

I recommend that Motion for Summary Judgment of defendant THE AMERICAN EXPRESS COMPANY be GRANTED.

New Orleans, Louisiana July 22, 1977.

/s/ Kenneth C. Hughes
KENNETH C. HUGHES
United States Magistrate

[The Exhibits referred to in the Report and Recommendation of the United States Magistrate are not included in this Joint Appendix.]

V. Order of Supreme Court granting Petition for Writ of Certiorari

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[Order of the Supreme Court filed January 12, 1981]

80-202

LOUIS R. KOERNER, SR.

v.

THE AMERICAN EXPRESS COMPANY

The petition for a writ of certiorari is granted.

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NOV 8 1980

MICHAEL RODAK, JR., CLER

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 80-202

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Louis R. Koerner, Jr.
LAW OFFICES OF LOUIS R. KOERNER, JR.
A Professional Law Corporation
1204 Jackson Ave.
New Orleans, Louisiana 70130
(504) 581-9569

Counsel for Respondent

QUESTION PRESENTED FOR REVIEW

In the absence of a workable test for classifying credit card transactions as being either primarily for business purposes or primarily for personal use, should a credit card issuer be required to abide by the provisions of the 1974 Fair Credit Billing Act, 15 U.S.C. § 1666, before revoking the credit card of an individual who has signed as jointly and severally liable for the debts incurred thereon, regardless of the purpose of use of the card.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No.

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respondent, Louis R. Koerner, Sr., respectfully submits this response to the petition for a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered April 7, 1980, and further respectfully prays that said writ be denied.

STATEMENT OF THE CASE

Respondent, Louis R. Koerner, Sr., filed suit in November of 1976 against Petitioner, the American Express Company, alleging that

Petitioner violated the provisions of 15 U.S.C. § 1666 in that it wrongfully revoked Respondent's credit card as a result of a billing dispute. Petitioner filed a Motion for Summary Judgment, contending that the statute, 15 U.S.C. § 1666, does not apply to transactions of a business or commercial nature pursuant to 15 U.S.C. § 1603. The United States Magistrate rendered his initial report, recommending that the Motion be granted. The District Court, the Hon. Edward J. Boyle, Sr., affirmed the decision [444 F.Supp. 334], and in so doing dismissed other pendent state claims which were dependent upon federal jurisdiction under 15 U.S.C. § 1666.

Respondent filed a Motion for New Hearing and to Alter or Amend Judgment and/or for a New Trial, which motion was denied by District Judge Boyle on January 4, 1978.

On appeal, the Fifth Circuit Court of Appeals, Wisdom, J., reversed and remanded the case, 615 F.2d 191 (5th Cir. April 7, 1980), holding that the provisions of the Truth in Lending Act dealing with the correction of billing errors and requiring that a credit card issuer take certain steps before restricting or closing a credit card account were applicable to an individual cardholder who was jointly and severally liable with his

employer for debts charged to the card.

This holding is limited to an interpretation of one section of the 1974 amendments to the Truth in Lending Act, 15 U.S.C. § 1666, and does not in any way threaten to disrupt the business credit transaction exemption that governs the broad range of commercial practices to which Petitioner refers. Business credit transactions are the subject of the original 1968 Truth in Lending Act, and nothing in the Fifth Circuit decision in the present case nullifies the effect of the 15 U.S.C. § 1603 business and commercial exemption as it pertains to those transactions.

The facts which gave rise to the instant litigation are as follows. On November 16, 1965, the corporation, John E. Koerner & Company, Inc., made an application for a company account American Express card. The application was approved, and the account was opened. Also on November 16, 1965, Louis R. Koerner, Sr., Respondent herein, a company officer, completed a form labeled "Application for Supplementary Credit Card, Company Account." This application was approved, and the card was issued. Respondent signed a statement joining the application and assuming joint and several liability for any debts. Respondent used the card both for business and

personal purposes and, although all charges were billed to the company, Respondent remitted payment to American Express for a number of transactions with personal checks drawn on his own account. In 1975, a billing dispute arose over the following charges included on the combined billing statements sent to the company:

(a) Three debits in the amount of $3.00 each and one debit in the amount of either $3.00 or $6.00 for charges made by Respondent in July, August, September and October of 1975 for air flight insurance for trips conducted for business purposes.

(b) A debit of $20.00 representing, according to Respondent, "a charge for Mr. John E. Koerner's card which was returned and for which credit was never given." This was a renewal fee for a card no longer desired.

(c) A debit of $20.00, ultimately cancelled by a credit which Respondent asserted was "a charge for a card of Ralph E. Koerner." The nature of the charge has not been established.

The dispute remained unresolved through September 28, 1976. On that date and when he attempted to use his card for the purchase of an airline ticket at the New Orleans International Airport, Respondent was asked to speak by phone to a representative of American Express. Following the conversation with the

representative, Respondent was presented with his credit card cut in two. The purpose of the trip for which the ticket was to be purchased was business related.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH THE RELEVANT PRIOR JUDICIAL INTERPRETATIONS OF THE CREDIT CARD PROVISIONS OF THE TRUTH IN LENDING ACT

Petitioner claims that the Fifth Circuit Court of Appeals decided that the Truth in Lending Act applies to every extention of credit for which an individual may be liable and that the decision ignores the exemption for business and commercial transactions provided by 15 U.S.C. § 1603.

The decision of the Court of Appeals is not, however, as broad as Petitioner contends. The scope of the case is strictly limited to an interpretation of one section of the 1974 amendments to the Truth in Lending Act, specifically 15 U.S.C. § 1666, the amendment dealing with the settlement of billing disputes in credit card transactions. The decision does not affect the exemption for business and commercial transactions provided for in 15 U.S.C. § 1603.

Although the Court of Appeals did not decide whether the business exemption should

be applied to the 1974 amendments dealing with credit cards, both judicial and administrative interpretations, as well as the legislative history, of these amendments lead to the conclusion that the exemption for business and commercial transactions allowed under 15 U.S.C. § 1603 should not apply to the 1974 amendments.

When Congress enacted the Truth in Lending Act in 1968, the original Act contained no provisions regarding credit card transactions, but was intended to provide "a meaningful disclosure of credit terms" to consumers. 15 U.S.C. § 1601. As the Act was a piece of consumer protection legislation focused on consumer credit transactions, exemptions were allowed for corporate debtors and individuals who secure credit for business or commercial purposes. These debtors were thought to be amply sophisticated to make informed judgments as to the value of alternative credit plans and to be able to negotiate beneficial credit terms, so as not to require the special disclosure protections provided by the Act. Hence, 15 U.S.C. § 1603 exempted "credit transactions involving extentions of credit for business or commercial purposes or . . . to organizations [defined to include corporations and partnerships]."

The business or commercial purpose exemptions remain in full force with regard to the provisions of the 1968 Truth in Lending Act itself, and it is not these exemptions which are at issue in the present case. Accordingly, the cases cited by the Petitioner are inapposite to the issue presented in the case at bar.

Petitioner cites cases dealing with extentions of credit which are, without dispute, contemplated by the 1968 Act, such as commercial loans, Poe v. First National Bank of DeKalb County, 597 F.2d 895 (5th Cir. 1979), Weingarten v. First Mortgage Co., 466 F.Supp. 349 (E.D. Pa. 1979); mortgages for the acquisition or improvement of commercial property, Adema v. Great N. Dev. Co., 374 F.Supp. 318 (N.D. Ga. 1973), Puckett v. Georgia Homes, Inc., 369 F.Supp. 614 (D.S.C. 1974), Sapenter v. Dreyco, Inc., 326 F.Supp. 871 (E.D. La.), aff'd, 450 F.2d 941 (5th Cir. 1971), cert. denied, 406 U.S. 920 (1972), Tower v. Home Const. Co. of Mobile, Inc., 458 F.Supp. 112 (S.D. Ala. 1978); and loans for the purchase of personal automobiles, Gallegos v. Stokes, 593 F.2d 372 (10th Cir. 1979), Smith v. Chapman, 436 F.Supp. 58 (W.D. Tex. 1977), aff'd, 614 F.2d 968 (5th Cir. 1980), Vines v. Hodges, 422 F.Supp. 1292 (D.D.C. 1976).

These credit transactions are easily classified as transactions for business or commercial purposes, or as transactions for "personal, family, household, or agricultural purposes," and, as part of the 1968 Act, are exempted by 15 U.S.C. § 1603 when classified as the former.

The 1970 and 1974 amendments to the Truth in Lending Act, which deal with credit card transactions, present a much more problematic situation when an attempt is made to reconcile them with the business and commercial exemptions of 15 U.S.C. § 1603. Judicial and administrative interpretations of the 1970 amendments, which sought to prevent the issuance of unsolicited credit cards, 15 U.S.C. § 1642, to limit to $50.00 the liability for the unauthorized use of a credit card, 15 U.S.C. § 1643, and to provide criminal sanctions for the fraudulent use of a credit card, 15 U.S.C. § 1644, concluded that the business and commercial exemptions provided by 15 U.S.C. § 1603 were inappliciable to the amendments. See, American Airlines, Inc. v. Remis Industries, Inc., 494 F.2d 196 (2d Cir. 1974), Federal Reserve Board regulation 12 C.F.R. 226.13(a)(4), (1973)(amended Nov. 2, 1972) now codified at 226.2(m), and a Federal Trade Commission decision, In re Credit Card Service

Corp. d/b/a Credit Card Service Bureau, 82 F.T.C. 191, 209-11 (1973), affirmed and enforced sub nom. Credit Card Service Corp. v. Federal Trade Commission, 495 F.2d 1004 (D.C. Cir. 1974). These interpretations by Courts of Appeals, as well as by the Federal Reserve Board and the Federal Trade Commission, construed the credit card amendments to the Truth in Lending Act as applicable to all credit cardholders, including corporations.

The conflict between the business exemptions of 15 U.S.C. § 1603 and the 1970 credit card amendments arises for two reasons. First, unlike other forms of credit transactions in which the potential corporate debtor, being in a better bargaining position than its consumer counterpart, may negotiate better credit terms, there is no distinction between the corporate and the consumer credit cardholder when faced with a standardized credit card application form. The use of form contracts for credit card applications, the Remis Court stated, makes the process "a take-it-or-leave-it method of contract formulation." 494 F.2d at 202. Secondly, there is no viable way of distinguishing between credit cards issued for "business purposes" and those issued for "personal use," since a credit card is often used for both personal and business trans-

actions. The Courts have uniformly held that any "purpose of use" or "predominant use" test for classifying a particular credit card as either business or personal is unwieldy and totally unworkable. The Courts have thus held that the amendments to the Truth in Lending Act which deal with credit card transactions were intended to apply to all credit card transactions, including business and commercial transactions.

The Fifth Circuit Court of Appeals, while acknowledging the validity of the prior judicial and administrative interpretations of the credit card provisions of the Truth in Lending Act, declined to resolve the question of whether 15 U.S.C. § 1666 covers corporate transactions and transactions for business or commercial purposes, but rather based its decision on a much narrower ground. The Court found that Respondent was a consumer within the meaning of the specific provision, since he had signed a statement joining in the application and assuming joint and several liability for any debts incurred on the card. Since Petitioner could recover from either Respondent or from the company, the Court held that it must abide by the requirements of 15 U.S.C. § 1666 for correction of billing errors in a consumer's credit card statement.

The Court recognized that its decision prevented application of the business exemption of 15 U.S.C. § 1603 to 15 U.S.C. § 1666 when an individual is liable for the debts incurred, but stated that this result is in consonance with the purpose of the Fair Credit Billing Act of 1974, i.e., the 1974 amendments to the Truth in Lending Act, of which 15 U.S.C. § 1666 is a part -- protecting consumers from the harrassment of creditors. See S.Rep. No. 278, 93d Cong., 1st Sess. 1-2, 4-6 (1973); S.Rep.No. 750, 92d Cong., 2d Sess. 1-4 (1972).

While the Court may not have wished to resolve the issue of whether corporate transactions and transactions for business or commercial purposes are protected by the 1974 amendments dealing with credit cards, its decision protecting individuals who may be liable for debts incurred on their credit cards was the only possible solution in light of the difficulty of classifying credit cards as to their "predominant use." It is the individual consumer who is subjected to the harrassment and embarrassment which the amendments are designed to prevent.

The only workable method of protecting the individual from such harrassment, in the absence of any viable test for classifying

credit cards, is to apply the protections of 15 U.S.C. § 1666 to any individual who is personally liable for the debts incurred on the card. This rule of decision sets up a simple and straightforward test which is non-technical and easily understandable, and which can be applied in all situations by the issuer and the cardholder with a minimum of difficulty.

It would seem as Petitioner should welcome such a test, as it eliminates the prospective uncertainty on the part of the credit card issuer as whether or not to comply in a particular case with 15 U.S.C. § 1666. The predominant use test invites violation, since the facts of predominant use by the cardholder would not ordinarily be within the knowledge of the issuer. The test established by the Court of Appeals provides a procedure for ascertaining in advance the necessity of compliance, a test which can be utilized prior to the initial extension of credit, and which therefore reduces or eliminates the risk of an inadvertent violation.

In the facts of the case at bar, there was never any prior notification to Respondent from the Petitioner that the billing error was the cause of any problem, nor that Petitioner was even considering the revocation of the

card. The card was revoked unilaterally, without notice, without an opportunity to explain, and without opportunity to contest. The unfairness and the embarrassment were maximized. Surely this is exactly the type of action which the provisions of 15 U.S.C. § 1666 were intended to correct.

In sum, the decision of the Fifth Circuit Court of Appeals in the instant case is a well-considered, easily understandable, easily applicable test for the protection of individuals who, like Respondent, are liable for the debts incurred on their credit cards. The scope of the decision is limited solely to the provisions of 15 U.S.C. § 1666 and is not in conflict with the long-standing business exemption to the credit transactions of the 1968 Truth in Lending Act. For that reason, certiorari should be denied.

II. WHERE ADMINISTRATIVE INTERPRETATIONS ARE AT VARIANCE WITH ONE ANOTHER, A COURT MUST WEIGH THE OPINIONS IN ARRIVING AT ITS DECISION

Petitioner contends that the Court of Appeals violated the recent holding of this Court in Ford Motor Credit Company v. Milhollin, ____ U.S. ____, 100 S.Ct. 790 (1980), by disregarding the Federal Reserve Board staff opinion which stated that the Truth in Lending

Act would not apply in a case such as the one at bar. The Fifth Circuit recognized that the interpretive letter should be given great weight, in light of the Milhollin decision. However, the letter is in conflict with the language of the statute, as well as with Federal Reserve Board regulations.

The Court explained that, regarding the language of the statute itself, although the term "cardholder" is not used in 15 U.S.C. § 1666, it is used in 15 U.S.C. § 1666f, h & j, companion sections to 15 U.S.C. § 1666. Use of the term "cardholder" would suggest that the provisions were applicable to all cardholders, regardless of the purpose for which the card was used. Secondly, the Federal Reserve Board uses "customer" rather than "obligor" throughout its regulations explaining 15 U.S.C. § 1666. One definition of "customer," stated the Court, is "cardholder." 15 C.F.R. 226.2(u). The Court determined that the regulations deserved as great a weight as the interpretive letter. In light of the practical difficulties in formulating a test for classifying a particular credit card as either for business or personal use, the Court weighed the conflicting interpretations in favor of protecting all individuals who may be liable for the debts incurred on their credit

cards, regardless of the purpose of use.

III. THE IMPACT ON CREDIT FOR BUSINESS ENTERPRISES WILL BE, AT MOST, MINIMAL AS A RESULT OF THE COURT OF APPEALS' DECISION

Finally, Petitioner claims that the decision of the Court of Appeals will have a significant impact on credit for business enterprises. This is simply not the case. As indicated above, the holding of the Fifth Circuit is a very narrow one, limited only to the 1974 amendment to the Truth in Lending Act. Thus, the effect on the majority of commercial credit transactions, such as loans to corporations, is non-existent, regardless of the practice of many lending institutions to require individual liability as security. These forms of credit transactions, easily classified as business or commercial in nature, remain untouched by the holding in the case at bar and are still exempted by 15 U.S.C. § 1603.

The sole credit transaction affected by the decision of the Court of Appeals is the credit card transaction in which an individual cardholder is signed as liable for the debts incurred on the card. Henceforth it will be necessary for the credit card issuer to abide by the requirements of 15 U.S.C. § 1666 in correcting billing errors or settling billing

disputes. The mechanisms for complying with the provisions of 15 U.S.C. § 1666 are already established for the millions of cardholders who have been issued their cards in their own names.

The additional "burden" of providing notice of a problem, of providing an opportunity to explain billing and payment discrepancies, and of providing an opportunity to contest the revocation of a credit card, will be, at most, minimal. Complying with these provisions will mean that credit card issuers will merely have to take the time to enclose some form of notice with the monthly bill and will have to listen to the explanation of a cardholder who has a discrepancy in his account statement. Certainly, such compliance is consonant with the purpose of the amendment -- to prevent the harrassment of consumers by creditors.

The alternative to such a holding would require a test for determining the classification of credit cards according to their use. Such tests have been shown to be unwieldy and unworkable. In addition, a test such as the "prospective predominant use" test developed by the District Court in the instant case, would be easily evaded.

Large corporations with many traveling employees would merely have these individual

employees acquire credit cards in their own names, then make contractual arrangements to reimburse employees for all business uses of the card (i.e. expense account reimubrsement). In this manner all uses of the card would be brought within the coverage of the Truth in Lending Act, even though the predominant use of the card was for business purposes. Conversely, the small businessman with no, or few, employees, who might acquire a credit card in his company name for reasons of convenience and economy, would not be protected by the provisions of the Truth in Lending Act, even though it is possible that the predominant use of the card would be for personal purposes.

To allow such an unworkable test to govern the application of the 1974 Truth in Lending Act provisions on credit card transactions would be to frustrate the very purpose of the amendments. Accordingly, the only way to achieve the purpose of the 1974 amendments is to require credit card issuers to abide by the requirements of 15 U.S.C. § 1666 in all instances where the issuer is allowed to collect its debts from a consumer.

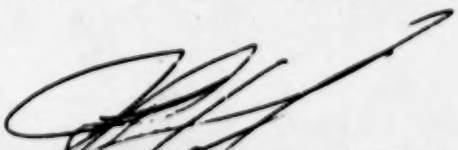
CONCLUSION

The decision for which Petitioner seeks review is narrow in scope. It does not limit

the applicability of the business or commercial transaction exemption to the broad range of ordinary commercial credit transactions, but merely attempts to achieve the purpose of the 1974 Fair Credit Billing Act -- to prevent the harrassment of consumers by creditors. In the absence of a workable test for classifying credit cards as to their primary use, the decision provides a simple and straightforward test that is non-technical and easily understandable, and which can be applied in all situations with a minimum of difficulty or risk to the issuer. For these reasons, Respondent respectfully prays that the petition for a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

LAW OFFICES OF LOUIS R. KOERNER, JR.
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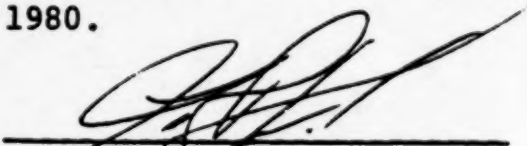
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CERTIFICATE

I hereby certify that a copy of the foregoing pleading has been served upon all interested counsel by placing a copy of the same in the United States Mail, postage prepaid and properly addressed, all on this 5th day of November, 1980.



Louis R. Koerner, Jr.

No. 80-202

NOV 26 1980

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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November 26, 1980

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-202

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Truth-in-Lending Act by its terms does not apply to business loans. The Fifth Circuit nonetheless ruled that the Act would be applicable where an individual assumes liability for business debts. The Fifth Circuit's opinion will radically alter business lending transactions and distort the availability and cost of funds. It also flies in the face of contrary rulings by the federal agency charged with responsibility for interpreting the Act.

Respondent in effect concedes that the ruling of the Fifth Circuit is wrong. Respondent admits that, under well-established principles of law, credit transactions having a business or commercial purpose are exempt from the Truth-in-Lending Act and that this exemption is not defeated because an individual assumes liability for business debts. Instead, Respondent argues only two points: (1) The Fifth Circuit's result can be supported by inventing a new rule denying the business credit exemption to business credit card programs; and (2) Since the

case can therefore be limited to credit cards, it lacks importance. Because Respondent's arguments are contrary to both the language and logic of the Fifth Circuit's opinion, and because Respondent does not quarrel with Petitioner's reading of the otherwise applicable legal principles, this case can be resolved simply. Certiorari should be granted and the decision below should be reversed.

I. The Fifth Circuit Has Effectively Repealed The "Business Purpose" Exemption From The Truth-in-Lending Act In All Cases Where An Individual Assumes Liability For Business Debts.

The Fifth Circuit specifically stated that it was ruling on only one issue: whether the business credit exemption provided by § 104 of the Truth-in-Lending Act is defeated because an individual assumes liability for the business debt. The Court said that it was *not* deciding whether the "business purpose" exemption was inapplicable to § 161 of the Act (the particular section assertedly violated by Petitioner). (App. A at 9a.) The Court noted that this question was "obviously difficult," and concluded that it "need not resolve that question, because a narrower ground for decision exists in this case" (App. A at 9a), i.e. whether the individual's assumption of liability to support a business loan makes the business exemption ineffective.

Respondent tries to read the lower court decision differently. Ignoring the express language quoted above, Respondent (while admitting that the Court of Appeals "did not decide" the issue, Response at 5-6) argues that § 104 is inapplicable to § 161 because of conflicts between the two sections, and that the existence of this conflict justifies the outcome reached by the lower court. Because of these assumed conflicts, Respondent argues that the lower court holding rests solely on an interpretation of § 161, that this section only applies to credit card companies and is therefore of little general importance, and that the decision is irrelevant to the broader range of credit trans-

actions potentially covered by § 104. This reasoning is flawed on all counts and cannot be accepted as a sound basis for denying the Petition.

First, the Fifth Circuit's decision cannot be "strictly limited to an interpretation of one section [§ 161] of the 1974 amendments to the Truth in Lending Act," as Respondent alleges. Response at 5. The Truth-in-Lending Act is structured in such a way that the § 104 exemption applies to all provisions of the Act, with the exception of three sections which are not involved in this case.[1] Unless there is a conflict between § 104 and the remaining provisions of the Act, the exemption contained in § 104 will be applicable to each of those provisions. Since the Fifth Circuit ruled in Respondent's favor, it must either have been interpreting the § 104 exemption (which would make the decision generally applicable to all Truth-in-Lending provisions) or it must have found that § 161 contains some provision implicitly repealing the § 104 exemption insofar as it would otherwise apply to that section. Since the Court expressly stated that it was *not* deciding "whether [§ 161] covers corporate transactions and transactions for business or commercial purposes" (App. A at 9a), its decision must logically be of general applicability.

Second, the Fifth Circuit could not properly have determined that there was a conflict between § 104 and § 161 because the express language of § 161 shows unambiguously that there is no conflict. Section 161 concerns billing errors in a "statement of the obligor's account in connection with an extension of *consumer credit.*" § 161(a), 15 U.S.C. § 1666(a) (1976) (emphasis added). The specific subsection of § 161 applicable to Respondent's claim below governs the closing of an "open-end *consumer*

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[1] Section 135 of the Act, 15 U.S.C. § 1645 (1976), provides that § 104 is not applicable to §§ 132, 133, and 134, 15 U.S.C. §§ 1642-44 (1976). Those sections concern issuance of unsolicited credit cards, limits of liability, and fraud.

credit plan" where the obligor has given the requisite notice of an alleged billing error. § 161(d), 15 U.S.C. § 1666(d) (1976) (emphasis added). Because the references to consumer credit serve to limit the operation of § 161 to non-business transactions,[2] § 161 cannot be read to preclude application of the business credit exemption contained in § 104.

Third, it is not true, as Respondent alleges, that § 161 (and other 1974 amendments) implicitly repealed § 104 with respect to those sections because of the difficulties in applying § 104 to credit cards. Respondent argues that because there is no "viable way" of distinguishing business from personal cards, Response at 9-10, the courts should interpret the Act to make § 104 inoperative, thereby extending the protections of the Truth-in-Lending Act to all individuals who are holders of credit cards. But the District Court had no difficulty articulating a "viable way" of distinguishing business from personal cards: one should simply determine, when a card is issued, whether "the reasonably anticipated predominant use" was for business or personal purposes. (Appendix C at 12c). The Federal Reserve Board staff has articulated

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[2] The Truth-in-Lending Act provides that:

> [t]he adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and *the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.*

§ 103(h), 15 U.S.C. § 1602(h) (emphasis added).

According to Regulation Z:

> "Consumer credit" means credit offered or extended to a natural person, in which *the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes.* "Consumer loan" is one type of "consumer credit."

12 C.F.R. § 226.2(p) (1980) (emphasis added).

a similar test. Public Information Letter No. 727, November 13, 1975, issued by Griffith L. Garwood (Appendix G at 3g-4g). In any event, the issue raised by this Petition is not whether the District Court's formulation is correct, or whether the test articulated by the Federal Reserve Board staff is correct, or even whether any other test which Respondent might propose is correct. The issue is whether the Court of Appeals can be allowed to avoid the need to formulate an appropriate test by creating, based on its own concept of equity, an exception from the otherwise applicable "business purpose" exemption for situations in which an individual is personally liable to a creditor. Since there is not, and cannot logically be, any basis for such a special rule, this Court should require the Court of Appeals to face the underlying issue.

Finally, respondent cites *American Airlines, Inc.* v. *Remis Industries, Inc.*, 494 F.2d 196 (2nd Cir. 1974) and *Credit Card Service Corp.* v. *FTC*, 495 F.2d 1004 (D.C. Cir. 1974) to suggest that § 104 does not apply to § 161. These cases are wholly inapposite. Because they dealt only with the 1970 amendments to the Truth-in-Lending Act, *not* the 1974 amendments to the Act which include § 161, they have no direct application here. Moreover, the reasoning of the two decisions has no bearing on resolution of the present case.

American Airlines and *Credit Card Service Corp.* together ruled that § 104 does not prevent the application § 133 of the Act and, by implication, the other 1970 amendments, 15 U.S.C. § 1642-44 (1976) (sections not at issue here) to business credit cards. These rulings—now codified at § 135 of the Act, 15 U.S.C. § 1645 (1976)—turned on an interpretation of the particular sections at issue. The cases found a conflict between § 104 and the 1970 amendments. Here, as we have previously noted, there is no basis for a finding of conflict between § 104

and § 161. Second, before *American Airlines* and *Credit Card Service Corp.* were heard, the Federal Reserve Board had determined that there was a conflict between § 104 and the 1970 amendments and had promulgated an amendment to Regulation Z providing that the business purpose exemption under § 104 would not apply to these provisions. 12 C.F.R. § 226.13(a)(4) (1973) (amended Nov. 2, 1972), now codified at § 226.2(m). Thus the two cases followed and confirmed prior administrative interpretations of the sections at issue. Here, the position of the Federal Reserve Board staff is that the 1974 Fair Credit Billing amendments, which include § 161, are subject to the § 104 business purpose exemption. Public Information Letter No. 1004, February 10, 1976, issued by D. Edwin Schmelzer (Appendix G at 7g-8g). Under these circumstances, *American Airlines* and *Credit Card Service Corp.* provide no support for Respondent's contentions.

II. Respondent Has Disregarded The Holding Of This Court In *Ford Motor Credit Co.* v. *Milhollin.*

Respondent has largely ignored Petitioner's argument that the court below was obliged under *Ford Motor Credit Co.* v. *Milhollin*, 100 S. Ct. 790 (1980), to follow applicable Federal Reserve Board staff opinions unless it finds those opinions "demonstrably irrational." As explained in the Petition, the Board staff has consistently taken the position that credit transactions for a business or commercial purpose are exempt from the coverage of the Act, even if an individual executes or guarantees the loan obligation. It has also determined that this exemption is applicable to that part of the Truth-in-Lending Act which contains § 161. Neither the Fifth Circuit nor Respondent have even attempted to apply the standard of review re-

quired under *Milhollin*. Instead, the Response, like the Fifth Circuit's opinion, relies on a strained reading of the definitions contained in Regulation Z to suggest that a contrary reading of the statute and regulations is more persuasive than the one adopted by the staff. But that is not the test. The Fifth Circuit did not purport to find that the staff's approach was "demonstrably irrational," and indeed it could not have done so in light of the language (cited above) specifically restricting § 161 to "consumer credit" transactions. *Supra* at 3-4. Under *Milhollin*, the decision below cannot stand.

III. Respondent, By Misconstruing The Scope Of The Lower Court's Decision, Has Misconceived Its Impact On Credit For Business Enterprises.

Respondent argues that the decision of the Court of Appeals deals only with credit cards and is therefore unimportant. Even if the decision had been so limited, respondent is seriously mistaken in his belief that the impact is minimal. Business credit cards are an efficient and convenient means of extending credit to both large and small enterprises. Their use is widespread: there are millions of cards issued under a wide variety of business programs. The opinion below will have significant effects on both the users and issuers of such cards.

In any event, the Court of Appeals did not limit its decision to credit cards. The court explicitly elected to establish a generic rule: it held that the § 104 business purpose exemption will not apply where an individual assumes liability for debts incurred. This means that in every instance where the individual assumes liability, the creditor will be subject to the Truth-in-Lending Act. Because of the importance of personal guarantees or other personal liability in business credit transactions, the

court's decision has serious consequences for all business credit, and this Court should grant the Petition to correct the error made by the Fifth Circuit.

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November 26, 1980

No. 80-202

FEB 26 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

The Truth-in-Lending Act does not apply to "credit transactions involving extensions of credit for business or commercial purposes." § 104(1), 15 U.S.C. § 1603(1) (1976). Should credit extended for business or commercial purposes become subject to the Act solely because an individual, following customary business practice, may also agree to be liable for the business debt? *

---

*American Express Company has no parent companies, subsidiaries (except wholly-owned subsidiaries), or affiliates that are required to be disclosed pursuant to Rule 28.1 of the Rules of this Court, other than the following: American Express Argentina, S.A. (Argentina); American Express D'Espana, S.A. (Spain); Arrendadora Commercial—Amex, S.A. (Mexico); Bancom Group, Inc. (Philippines); Egyptian American Bank (Egypt); Ivory & Sime Ltd. (Scotland); Jetamex Ltd. (United Kingdom); Pacific Bank Berhard (Malaysia); Société Francaise Du Cheque De Voyage (France); Warner Amex Cable Communications Inc.; Warner Amex Cable Communications Company; Warner Amex Satellite Entertainment Company; and Warner Amex Satellite Entertainment Corporation. Various other corporations affiliated with the Warner Amex entities listed above operate or have applied for cable television franchises in various cities throughout the country.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-202

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

OPINION BELOW

The Opinion and Judgment of the Court of Appeals reversing the District Court's judgment in favor of Petitioner is reported at 615 F.2d 191 and appears in the Appendices to the Petition for Certiorari (Pet. App.) at Appendix A. The Order of the Court of Appeals denying a Petition for Rehearing appears in Appendix B to the Petition. The Memorandum Opinion and Order of the District Court is reported at 444 F. Supp. 334 and appears in Appendix C to the Petition. The Judgment of the District Court appears in Appendix D to the Petition.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Court of Appeals was entered on April 7, 1980. A timely petition for re-

hearing en banc was denied on May 12, 1980. Petitioner filed a timely petition for writ of certiorari on August 11, 1980, invoking jurisdiction under 28 U.S.C. § 1254 (1) (1976). Certiorari was granted by order of January 12, 1981. (Joint Appendix (J.A.) at 55a.)

STATUTES, REGULATION, AND INTERPRETIVE LETTERS INVOLVED IN THE CASE

The statutory provisions involved are §§ 104(1) and 161 of the Truth-in-Lending Act, 15 U.S.C. §§ 1603 (1) and 1666 (1976) (Pet. App. Appendix E). The regulation involved is a provision of the Federal Reserve Board's Regulation Z, 12 C.F.R. § 226.3(a) (1980) (Pet. App. Appendix F). This case also involves several Public Information Letters of the Federal Reserve Board (Pet. App. Appendix G).

STATEMENT OF THE CASE

The question presented by this case is a straightforward but important one: Does the Truth-in-Lending Act apply to business loans secured by an individual's personal liability? Because the Act was designed to protect individuals who obtain credit for consumer purposes, it contains a broad exemption for credit transactions for business or commercial purposes. *See* § 104(1), 15 U.S.C. § 1603(1) (1976). The Court of Appeals held that the business purpose exemption is defeated if an individual is made personally liable for a business debt.

If the decision of the Court of Appeals is allowed to stand, the commercial credit industry—borrowers and lenders alike—will be forced either to abandon use of personal liability in business credit transactions or to restructure their procedures to comply with the Truth-in-Lending Act. Personal liability is a common element in a broad range of business credit transactions, particularly those involving unincorporated businesses and small

or new corporations. Abandoning use of personal liability would adversely affect the availability and cost of credit for business borrowers. On the other hand, the Truth-in-Landing Act contains an extensive and complicated array of regulatory requirements (including those relating to disclosure, resolution of billing errors, and advertising) which were enacted with consumer credit in mind and which are not easily applied in a commercial context. Application of these requirements to business credit transactions would lead to needless disruption of creditor lending procedures, with increased costs and inconvenience for borrowers.

The facts giving rise to the litigation can be summarized briefly: On November 16, 1965, a company called John E. Koerner & Co., Inc., (the "company") applied for an American Express account. (J.A. at 25a.) At the same time the application was filed, the company requested that cards bearing the name John E. Koerner & Co., Inc., be issued to John Koerner and to the Respondent, Louis R. Koerner, Sr. ("Koerner"), both employees of the company. For Louis Koerner's card, both he and the company signed a "company account" request form. By signing, Koerner agreed to be jointly and severally liable, along with the company, for all charges incurred through use of the company card which also bore his name. (J.A. at 28a.)

The application forms requested credit information about the company, but not about Koerner or any other employee. American Express evaluated the information about the company and approved the applications. At the same time or shortly thereafter, the company apparently applied for at least three additional company cards to be issued for company employees. American Express issued these cards for Ralph E. Koerner, Dennis Thomas, and Carroll A. DeGeorge. In all, at least five cards were issued at one time or another on the company account. (Pet. App. at 3c.)

The account opened for John E. Koerner & Co. Inc., was a company account designed for business customers. (J.A. at 25a.) American Express also issues personal cards to non-business card customers. The record does not reflect whether Koerner ever applied for or received such a card. All charges for use of Koerner's company card, as well as the other company cards, were billed on one statement addressed to the company at its business address. The statement showed subtotals for each card, including the card used by Koerner. (Pet. App. at 2a; Statement of Uncontested Facts, Exhibit 3.)

In 1975, a dispute arose between the company and American Express over the billing of certain charges involving the cards of Koerner, John Koerner, and Ralph E. Koerner. The letters about the dispute were sent to American Express on John E. Koerner & Co. stationery. (J.A. at 38a, 43a.) All the disputed charges were admittedly incurred for business purposes. (J.A. at 35a-37a, 41a-42a.)

The dispute had not been resolved on September 28, 1976, when Koerner attempted to use his card at New Orleans International Airport to purchase an airline ticket for a business trip. (J.A. at 38a, 40a.) The ticket agent called American Express to check the status of the account and then (apparently at American Express' request) returned Koerner's card to him, cut in half. (J.A. at 18a.)

Koerner brought suit in the United States District Court for the Eastern District of Louisiana, claiming that revocation of his card violated § 161 of the Truth-in-Lending Act, 15 U.S.C. § 1666 (1976), a section originally enacted as part of the 1974 Fair Credit Billing Act.[1] This section prohibits, among other things, certain

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[1] Koerner also claimed that American Express violated § 127 of the Act, 15 U.S.C. § 1637 (1976), which requires certain periodic disclosures. *See* § 127(a)(8). Because Koerner asserts that the relevant portion of § 127 is made applicable to American Express

actions by a credit card issuer against a cardholder while the issuer is processing complaints concerning billing errors. The company was not joined as a plaintiff and is not a party to this litigation. Jurisdiction of the District Court was invoked under 15 U.S.C. § 1640(e) (1976) and its counterparts, 28 U.S.C. § 1331 and § 1337 (1976).

Following the recommendation of a magistrate, the District Court granted summary judgment for American Express, holding that § 161 applies only to extensions of credit for consumer purposes and therefore does not apply to company accounts. (Pet. App. at 8c-9c, 17c.) The court reached this decision after fully reviewing the language of § 161 and the language of § 104(1) of the Act, which provides an exemption for "credit transactions involving extensions of credit for business or commercial purposes." (Pet. App. at 10c, 13c.) On appeal, the Court of Appeals for the Fifth Circuit reversed.

The Court of Appeals resolved the case on a theory not addressed by the District Court or by the parties in their briefs. The court recited the holding of the District Court that § 161 is not applicable to credit transactions for business or commercial purposes, but it added that it was not deciding this issue, which it described as "difficult." (Pet. App. at 9a.) Instead, the Court concluded that it was not fair for American Express to avoid complying with the Truth-in-Lending Act because Koerner, whom the court characterized as a "consumer," had assumed liability for the use of the company card embossed with his name:

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through § 161, (J.A. at 19a), his right to assert a violation of § 127 depends on the applicability of § 161. (Pet. App. at 5c.)

In addition, Koerner alleged that American Express violated Louisiana law by committing a tort through its breach of contract. Koerner later stipulated that this claim would not reach the requisite jurisdictional amount. (J.A. at 10a-20a.)

> Koerner signed a statement joining in the application and assuming joint and several liability for any debts. Therefore, American Express could recover from him or from the company. . . . The credit card company cannot have it both ways: If it does not want to be bound by consumer lending requirements, then it should not be allowed to collect its debts from a consumer. (Pet. App. at 9a-10a.) (Footnote omitted.)

In arriving at this conclusion, the Court of Appeals recognized that it was abandoning the business purpose test required by the language of § 104(1). It also found this result justified by equitable considerations:

> Although our decision prevents application of the [§ 104(1)] exemption for 'business or commercial purposes' to [§ 161] when an individual is liable for debts incurred, this result is consonant with the purpose of the Fair Credit Billing Act of 1974—protecting consumers from the harassment of creditors. (Pet. App. at 10a.)

SUMMARY OF ARGUMENT

I

The court below held that all business debts for which an individual has assumed liability are subject to the Truth-in-Lending Act, regardless of the § 104(1) business purpose exemption. But the language and legislative history of the Act show that Congress intended the applicability of the exemption to turn on the existence of a business or commercial purpose, not on the identity of the borrower. Congress' intent has been consistently followed by the Federal Reserve Board and its staff and, until this case, by the courts.

II

As an alternative ground for its decision, the court cited the "purpose of the Fair Credit Billing Act." The Fair

Credit Billing Act—a set of amendments to the Truth-in-Lending Act passed in 1974—contains § 161, the section assertedly violated by Petitioner. But nothing in the Fair Credit Billing Act indicates that Congress intended it to have broader application than other provisions of the Truth-in-Lending Act. The language, legislative history and, indeed, the purpose of the Fair Credit Billing Act, as well as its administrative interpretation, all indicate that Congress devised the error resolution procedures of the Act to meet specific needs of consumers, and that business debtors were never expected to fall under its provisions.

III

The business purpose exemption, which the Court of Appeals' decision would undermine, reflects underlying commercial realities. The business of extending commercial credit, including commercial credit involving personal guarantees, involves procedures and business requirements quite distinct from those typical in a consumer context. Regulatory requirements devised for consumer credit cannot sensibly be applied in a commercial credit context, and Congress never intended for them to be so applied. The only foundation for the Court of Appeals' decision was its own concept of equity. But courts are not permitted to rewrite statutes to satisfy their own notions of fairness. When they attempt to do so, they upset the complex balance of regulatory and economic requirements considered by Congress.

ARGUMENT

I. ALL CREDIT TRANSACTIONS FOR BUSINESS OR COMMERCIAL PURPOSES ARE EXEMPT FROM THE TRUTH-IN-LENDING ACT, REGARDLESS OF WHETHER AN INDIVIDUAL ASSUMES LIABILITY FOR THE BUSINESS DEBT.

A. The Court of Appeals' Decision Is Contrary to the Language and Legislative History of the Act.

The ruling of the Fifth Circuit was a simple one: all loans for which "consumers" may be liable are subject to the Truth-in-Lending Act. Because American Express could not "have its cake and eat it too," the Court of Appeals concluded that if American Express did not "want to be bound by consumer lending requirements, then it should not be allowed to collect its debts from a consumer." (Pet. App. at 10a.)

This play on the word "consumer," appealingly symmetrical as it may appear, distorts both the language and the legislative history of the Truth-in-Lending Act. In adopting the Act, Congress exempted all credit transactions having a business or commercial purpose, regardless of the identity of the obligor. The exemption turns on the nature of the loan transaction, not on a characterization of the debtor.

1. *The Language of the Act Clearly Exempts All Lending for Business or Commercial Purposes.*

We start with the language of the Act itself.[2] Here, the express language of the statute is clear. Section 104(1) of the Act provides a blanket exemption for all "credit transactions involving extensions of credit for

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[2] This Court has found that "there is no need to refer to the legislative history where the statutory language is clear." *Ex Parte Collett*, 337 U.S. 55, 61 (1949); *see Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976).

business or commercial purposes." The language is phrased in terms of the purpose of the extension of credit, not the identity of the debtor. Moreover, the Truth-in-Lending Act is structured in such a way that the § 104(1) business purpose exemption applies to all provisions of the Act, with the exception of three sections not involved in the case which are specifically excepted from its operation;[3] the introductory language to § 104 states flatly that "[t]his subchapter [identifying the Truth-in-Lending Act] does not apply" to the transactions exempted in § 104.

If all this were not clear enough, the remainder of § 104(1) makes Congress' intent unmistakable. In addition to the exemption for credit transactions for business or commercial purposes, the section contains an additional exemption for extensions of credit to "organizations." Section 103(c) of the Act defines an organization as a "corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association." 15 U.S.C. § 1602(c) (1976). It is thus evident that Congress knew how to make an exemption turn on the identity of the obligor and that it in fact had exempted all extensions of credit to the most common business entities: corporations and partnerships. The business purpose exemption, if it is not to be viewed as meaningless surplusage, obviously must have been intended to go further, *i.e.*, to exempt all business loans from the Act, regardless of whether the debtor was a corporation, a partnership, or an individual.

Other language in the Act also shows that Congress was limiting its attention to credit extended to natural persons who were borrowing for personal, family, or household purposes, and that individuals borrowing for business purposes were never intended to be covered.

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[3] These three sections, §§ 132-134, 15 U.S.C. § 1642-44 (1976), pertain to issuance of unsolicited cards, limits of liability, and fraud.

Each of the major substantive sections of the Act, including the general section requiring disclosures, § 121(a), 15 U.S.C. § 1631(a) (1976), and the later-added section involving billing errors that is involved in this case, § 161, 15 U.S.C. § 1666 (1976), refers to extensions of "consumer credit." The term "consumer" is, in turn, defined in § 103(h), 15 U.S.C. § 1602(h) (1976):

> The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, *and* the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes. (Emphasis added.)[4]

The use of the word "and" in this definition makes it clear that credit extended to natural persons is covered *only* when the credit is being extended for personal, family, or household purposes. Credit extended to individuals for business purposes is not covered by the Act, even without regard to the exemption provided by § 104(1).

2. *The Legislative History of the Act Also Shows that the Business Purpose Exemption Was Intended to Apply to All Business Lending.*

The evolution of the business purpose exemption supports this analysis. The earliest Truth-in-Lending bills, introduced by the late Senator Paul Douglas, had no statutory business exemption. These early bills would have covered *all* credit transactions involving any "person," defined to include, *inter alia*, an individual, partnership,

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[4] Reference to "agricultural purposes" will be deleted from this definition of "consumer," effective March 31, 1982, by operation of the Truth-in-Lending Simplification and Reform Act, §§ 603(a), 625(a), Pub. L. 96-221, 94 Stat. 132 (1980).

or corporation.[5] This broad coverage was limited only by a delegation of authority to the Federal Reserve Board to establish exemptions where it determined that the protections of the Act were not necessary:

> The Board shall exempt those credit transactions involving extensions of credit to business firms, governments, or governmental agencies or instrumentalities as to which it determines adherence to the disclosure requirements of this Act is not necessary to carry out the purpose of this Act.[6]

These early versions encountered stiff resistence, and although hearings were held, the bills never reached a vote in either house. In order to meet some of the objections to the earlier bills, Senator Proxmire introduced a narrower bill in 1967. The new bill, S. 5, started out with the same broad provisions on coverage as the earlier bills,[7] but now a new statutory exemption had been added. It covered:

> credit transactions involving extensions of credit to business firms as such, governments, or governmental agencies or instrumentalities.[8]

This exemption—like the one created by the Fifth Circuit in its opinion—would have turned solely on the identity of the debtor. Debts owed by individuals would be covered; debts owed by "businesses as such" would not. But Congress consciously decided to broaden the exemption. Following hearings on S. 5, where the scope

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[5] S. 750, 88th Cong., 1st Sess., §§ 3(2), 3(5), 4(a) (1963); S. 1740, 87th Cong., 1st Sess., §§ 3(2), 3(5), 4(a) (1961); S. 2755, 86th Cong., 2d Sess., §§ 2(1), 2(3), 3 (1960).

[6] S. 750, § 5(a); S. 1740, § 5(a). *See* S. 2755, § 4 ("The Board shall . . . exempt those transactions between business firms as to which it determines adherence with the disclosure requirements of this Act is not necessary to carry out the purpose of this Act.")

[7] S. 5, 90th Cong., 1st Sess., §§ 3(2), 3(9), 4 (1967).

[8] S. 5, § 8(1).

of the exemption was put in issue,[9] the Senate changed the exemption for "business firms as such" to the present exemption of "credit transactions involving extensions of credit for business or commercial purposes." As the Senate Report explained:

> The original S. 5 would have exempted credit to "business firms as such." This left an element of doubt with respect to credit granted to farmers, proprietorships, or self-employed professionals. This doubt is now clarified by the definition of credit under section 3(b) as credit for person [sic] other than an organization and "primarily for personal, family, household, or agricultural purposes." Credit for business or commercial purposes is exempted.[10]

The exemption and definition described in this Senate Report survived consideration in the House [11] and remained in the bill as finally enacted.

The reason for Congress' express decision to focus only on consumer credit, and to exclude all coverage of business credit, is apparent in the record. In numerous hearings held over a seven-year period, Congress collected evidence of a wide variation in consumer credit disclosure practices that made it difficult for consumers to learn the true cost of credit.[12] Congress determined that the

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[9] Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 664-65, 668-69 (1967).

[10] S. Rep. No. 392, 90th Cong., 1st Sess. 22 (1967). *See also* 113 Cong. Rec. 14694, 14695 (1967).

[11] H.R. 11601, 90th Cong., 1st Sess., §§ 202(b), 202(c), 203(n)(1) (1967).

[12] Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967); Hearings on S. 5 Before the Subcomm. on Financial Institution of the Senate Comm. on Banking and Currency,

appropriate response involved a strategy of full disclosure, tailored to the specific consumer credit problems that had been discussed during the hearings.[13] At the same time, Congress also determined that the new law should not cover transactions having a business or commercial purpose:

> By limiting the bill to the field of consumer credit, the committee believes it is providing disclosure requirements in an area where it is most essential. Most businesses or corporations are in a good position to judge the relative worth of alternative credit plans and by and large do not require the special disclosure protections provided by the bill.[14]

In short, Congress never intended to give the Act the broad coverage mandated by the Fifth Circuit's opinion. The Act was intended to cover only consumer credit transactions, and not transactions involving a business purpose, even where an individual might be liable for the business debt.

B. All Prior Administrative and Judicial Rulings Concerning the Business Purpose Exemption Have Applied the Exemption to All Business Loans, Even Those Made to Individuals.

Until this case was decided, every relevant administrative and judicial interpretation of the business purpose exemption had given it full scope, consistent with the Congressional intent described above.

90th Cong., 1st Sess. (1967); Hearings on S. 750 Before a Subcomm. of the Senate Comm. on Banking and Currency, 88th Cong., 1st & 2nd Sess. (1963-64); Hearings on S. 1740 Before a Subcomm. of the Senate Comm. on Banking and Currency, 87th Cong., 2d Sess. (1962); Hearings on S. 1740 Before a Subcomm. of the Senate Comm. on Banking and Currency, 87th Cong., 1st Sess. (1961).

[13] S. Rep. No. 392, 90th Cong., 1st Sess. 1 (1967); H. Rep. No. 1040, 90th Cong., 1st Sess. 6-7 (1967).

[14] S. Rep. 392, at 7.

1. *Numerous Federal Reserve Board Rulings on the Business Purpose Exemption Demonstrate that the Exemption Applies to Individuals.*

Under authority granted by Congress to interpret and administer the Truth-in-Lending Act, the Federal Reserve Board and its staff have issued a number of administrative rulings concerning the relevant sections of the Act. 15 U.S.C. § 1604 (1976). These rulings are contained in Regulation Z, 12 C.F.R. § 226.1 *et seq.* (1980), the basic regulatory implementation of the Act, and in a number of interpretive letters issued by the Board and its staff.

Under *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980), Regulation Z and the interpretive rulings play a critical role in interpretation of the Truth-in-Lending Act. In *Milhollin*, this Court held that the courts' "traditional acquiescense in administrative expertise is particularly apt" where the Federal Reserve Board and its staff interpret the Truth-in-Lending Act. *Id.* at 566. The court emphasized that "congress specifically designated the Federal Reserve Board and its staff as the primary source for interpretation and application of truth-in-lending law[s]." *Id.* Thus, Regulation Z serves to "elaborate and expand the legal framework" provided by the Act. *Id.* at 560.[15] Where the express language of the Act and Regulation Z do not resolve an issue of interpretation:

> [u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act should be dispositive

Id. at 565.[16]

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[15] *See also Mourning* v. *Family Publication Service, Inc.*, 411 U.S. 356 (1973).

[16] This Court is currently considering another case raising questions concerning the proper application of the *Milhollin* rule. *Anderson Bros. Ford* v. *Valencia, cert. granted*, 49 U.S.L.W. 3350 (Nov. 11, 1980), No. 80-84.

Under the directive of *Milhollin*, we look first to the express language of Regulation Z. Here, Regulation Z exempts "[e]xtensions of credit . . . for business or commercial purposes, other than agricultural purposes." 12 C.F.R. § 226.3(a) (1980). Like its counterpart in the Act, this exemption turns on the purpose of the transaction rather than the identity of the borrower.

This focus on purpose is also evident in the regulatory definition of "consumer credit," which is derived from the statutory definition of "consumer" described above. *See supra* at 10. Consumer credit is defined to mean

> credit offered or extended to a natural person, in which the money, property or service which is the subject of the transaction is primarily for personal, family, household or agricultural purposes.

12 C.F.R. § 226.2(p) (1980). Under these provisions, borrowing by an individual natural person is clearly not covered if the credit transaction at issue is for a business or commercial purpose.

Various interpretations issued by the Federal Reserve Board staff also show that the business purpose exemption applies to individuals. In one opinion letter directly on point, the staff ruled that the Truth-in-Lending Act would not apply where a corporation and a corporate employee are jointly and severally liable for obligations incurred on the employee's credit card, issued to the corporation for use by the employee. The staff stated that "[i]f the credit is for business or commercial purposes, it would not be subject to Truth-in-Lending by virtue of the exemption in § 226.3(a)." Public Information Letter No. 727, November 13, 1975, issued by Griffith L. Garwood.

Other staff opinion letters are similar. The staff has advised that where a corporation's principal shareholder guarantees a business loan made to the corporation, the transaction is exempt from the Truth-in-Lending Act

even though the shareholder provides his principal residence as security for the loan. Public Information Letter No. 277, March 10, 1970, issued by Kenneth A. Kenyon.[17] The staff has also determined that where credit is extended to an individual who buys securities to supplement his business income as a merchant, the transaction is exempt from coverage, even though the only obligor is a natural person. Public Information Letter No. 821, July 18, 1974, issued by Jerauld C. Kluckman. Because these rulings are not demonstrably irrational, they are dispositive. *Ford Motor Credit Corp.* v. *Milhollin*, 444 U.S. at 565.

2. *Under All Previous Court Rulings, the Business Purpose Exemption Applies to Individuals.*

Nor does the case law provide any support for the Court of Appeals' decision. The Tenth Circuit recently reviewed the case law interpreting the business purpose exemption and noted that "[c]ases considering whether a transaction is primarily consumer or commercial in nature look to the transaction as a whole and the purpose for which credit was extended." *Gallegos* v. *Stokes*, 593 F.2d 372, 375 (10th Cir. 1979). *See also Redhouse* v. *Quality Ford Sales, Inc.*, 511 F.2d 230, 234 (10th Cir. 1975). A recent ruling by another panel of the Fifth Circuit is in accord: "The courts will look to the purpose of the loan to determine whether it is covered by the Act." *Poe* v. *First National Bank*, 597 F.2d 895, 896

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[17] *See also* Public Information Letter No. 751, January 14, 1974, issued by Jerauld C. Kluckman (loan taken by individual exclusively for business purposes is exempt from coverage of the Truth-in-Lending Act, regardless of fact that loan will be secured by private home); Public Information Letter No. 663, January 23, 1973, issued by Jerauld C. Kluckman (loan transaction for commercial purposes is exempt from coverage of the Truth-in-Lending Act, regardless of fact that loan is secured by antiques used for personal, family, or household purposes).

(5th Cir. 1979).[18] Numerous district courts have either expressly endorsed[19] or implicitly applied[20] the same principle.

A review of these cases reveals that no court has ever before held that the Truth-in-Lending Act is applicable to a business loan transaction simply because an individual is liable for the business debt. Instead, the case law shows that once a business purpose is found, the courts uniformly hold that the § 104(1) exemption is applicable without regard to the identity of the debtor. In the *Poe* case cited above, for example, another Fifth Circuit panel specifically found it irrelevant that individual corporate officers had agreed to be personally liable for a corporation's debts; the court found it crucial that "the purpose of the transaction was to finance a corporation and its business." *Poe* v. *First National Bank*, 597 F.2d at 895.

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[18] *Citing Sapenter* v. *Dreyco, Inc.*, 326 F. Supp. 871 (E.D. La.), *aff'd*, 450 F.2d 941 (5th Cir. 1971), *cert. denied*, 406 U.S. 920 (1972); *Tower* v. *Home Constr. Co.*, 458 F. Supp. 112, 116-17 (S.D. Ala. 1978).

[19] *See, e.g., Weingarten* v. *First Mortgage Co.*, 466 F. Supp. 349, 352 (E.D. Pa. 1979) ("[t]he cases which have been called to this Court's attention appear to hold without exception that where the credit transaction is for a business purpose rather than for a personal, family, household or agricultural purpose, then the transaction is not covered by the Act"); *Tower* v. *Home Constr. Co.*, 458 F. Supp. 112, 116-17 (S.D. Ala. 1978); *Smith* v. *Chapman*, 436 F. Supp. 58, 61 (W.D. Tex. 1977), *aff'd*, 614 F.2d 968 (5th Cir. 1980); *Puckett* v. *Georgia Homes, Inc.*, 369 F. Supp. 614, 618-20 (D.S.C. 1974); *Adema* v. *Great N. Dev. Co.*, 374 F. Supp. 318, 319-20 (N.D. Ga. 1973); *Brill* v. *Newport Nat'l Bank*, Consumer Credit Guide (CCH) ¶ 99,057 (S.D.N.Y. 1973); *Sapenter* v. *Dreyco, Inc.*, 326 F. Supp. 871, 873-74 (E.D. La.), *aff'd*, 450 F.2d 941 (5th Cir. 1971), *cert. denied*, 406 U.S. 920 (1972).

[20] *See, e.g., Vines* v. *Hodges*, 422 F. Supp. 1292, 1297 (D.D.C. 1976); *Sambolin* v. *Klein Sales Co.*, 422 F. Supp. 625, 627 (S.D. N.Y. 1976); *Kenney* v. *Landis Financial Group, Inc.*, 376 F. Supp. 852, 853 (N.D. Iowa 1974).

Other cases applying the § 104(1) exemption show that a finding of business purpose is dispositive even where the debtor is an individual who is arguably less sophisticated in credit transactions than the businessman Respondent in this case. In a case before the Tenth Circuit, the Court of Appeals reversed a trial court ruling that the Truth-in-Lending Act applied to the purchase of a pick-up truck by two Navajo Indians. The court found that summary judgment in favor of the Indians was improper because the trial court had failed to determine whether the truck was to be used for business or for consumer purposes. *Redhouse* v. *Quality Ford Sales, Inc.*, 511 F.2d at 234.

Similarly, in *Tower* v. *Home Construction Co.*, 458 F. Supp. 112, 117 (S.D. Ala. 1978) the court held that a plaintiff who had secured credit for repairs to a private house was commercially moticated and thus not protected by the Truth-in-Lending Act because the house was being rented, even though the plaintiff ultimately intended to retire there. Likewise, in *Puckett* v. *Georgia Homes, Inc.*, 369 F. Supp. 614, 619-20 & n.6 (D.S.C. 1974), the court held that the plaintiff, a barber earning $5,000 a year, was not entitled to the protections of the Truth-in-Lending Act in securing credit to purchase a mobile home which he intended to rent.

II. NOTHING IN THE FAIR CREDIT BILLING ACT INDICATES THAT CONGRESS INTENDED IT TO HAVE BROADER APPLICATION THAN THE REMAINDER OF THE TRUTH-IN-LENDING ACT.

As an alternative ground for its holding that the business purpose exemption is not applicable where an individual assumes liability for a business debt, the Court of Appeals cited the purpose of the Fair Credit Billing Act to justify abandonment of the business purpose exemption. But nothing in the Fair Credit Billing Act indicates that Congress intended it to have broader application than the other provisions of Truth-in-Lending.

A. The Text And Legislative History of the Fair Credit Billing Provisions, as Well as Their Administrative Interpretation, Show that They Have No Broader Application than the Remainder of the Truth-in-Lending Act.

1. *The Language and Legislative History of the Fair Credit Billing Act Indicate that It is Subject to the Business Purpose Exemption.*

The business purpose exemption provided by § 104(1) is, by its language, applicable to the entire Act.[21] An explicit statement of Congressional intent would be required to prevent the exemption from applying in the context of this case. No such statement exists.

Moreover, the express language of § 161, the particular provision of the Fair Credit Billing Act assertedly violated by Petitioner, shows unequivocally that this section was intended to be fully subject to the business purpose exemption. Section 161 concerns billing errors in a "statement of the obligor's account in connection with an extension of *consumer credit.*" § 161(a), 15 U.S.C. § 1666(a) (1976) (emphasis added). The specific subsection of § 161 applicable to Koerner's claim below governs the closing of an "open-end *consumer credit* plan" where the obligor has given the requisite notice of an alleged billing error. § 161(d), 15 U.S.C. § 1666(d) (1976) (emphasis added). Because the references to consumer credit serve to limit the operation of § 161 to non-business transactions,[22] the text of § 161 cannot be read to preclude application of the business credit exemption contained in § 104(1).

The legislative history of the Fair Credit Billing provisions supports this interpretation. The Fair Credit

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[21] Section 135 makes § 104(1) inapplicable to three sections of the Act not involved in this case, §§ 132-34.

[22] *See supra* at 10, 15.

Billing Act grew out of congressional concerns that consumers had no effective recourse against creditors who failed to respond adequately to allegations of billing errors or who engaged in questionable billing practices. The Senate report accompanying the bill that ultimately was enacted focused solely on problems suffered by consumers in these areas. S. Rep. No. 278, 93d Cong., 1st Sess. 2-7 (1973).[23] Business credit cards were not a subject of concern. As the author of the law, Senator Proxmire, noted in connection with a predecessor to the bill that was ultimately enacted:

> It is my understanding, that even if [the credit card] is in your name, and not the name of the firm, if you use it for business purposes, you wouldn't have the protection of this bill.[24]

In further comments on the same bill, Senator Proxmire added:

> As you know, this law would not reach business transactions. By the amendment to the Truth-in-Lending Act business transactions are exempt.[25]

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[23] The Fair Credit Billing provisions were considered primarily by the Senate. The House did not engage in full debate on these provisions because they were added by the Senate to H.R. 11221, 93d Cong., 1st Sess. (1973), an unrelated House bill concerning depository institutions, following passage of that bill by the House. *See* 120 Cong. Rec. 19209-19214 (1974). The Conference Committee on H.R. 11221 accepted the new Fair Credit Billing provisions, H. Rep. No. 1429, 93d Cong., 2nd Sess. (1974), and the bill reported by the Conference was passed by the House even though the new provisions had never been the subject of debate by the full House. *See* 120 Cong. Rec. 34763-34770 (1974). The full history of the passage of the Fair Credit Billing amendments is set out at Pet. App. 18c-20c & n.1.

[24] Hearings on S. 652 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs, 92d Cong., 1st Sess. 66 (1971).

[25] *Id.* at 375.

Because the bill to which Senator Proxmire referred, S. 652, 92nd Cong., 1st Sess. (1971), was later resubmitted and enacted with only minor modification—none affecting the business purpose exemption—these statements apply with equal force to the Fair Credit Billing Act in its present form.

2. *The Specific References to Business Credit Cards in Section 135 of the Act Provide Additional Evidence that the Business Purpose Exemption Was Intended to Apply to the Fair Credit Billing Provisions.*

The Truth-in-Lending Act contains a section dealing specifically with the application of the business purpose exemption to business credit cards. That section—§ 135, 15 U.S.C. § 1645 (1976)—was added to the Act at the same time the Fair Credit Billing amendments were adopted and provides that the business purpose exemption does not apply to three specific credit card provisions which had been added to Truth-in-Lending in 1970. Section 135 does not, however, purport to prevent the application of the business purpose exemption to the Fair Credit Billing provisions, which Congress was enacting at precisely the same moment. This crucial omission from § 135 provides strong additional evidence that the Fair Credit Billing Act was fully subject to the business purpose exemption and was not intended to apply to credit extended for business or commercial purposes.

In 1970, Congress had added three sections to Truth-in-Lending to deal with specific credit card problems. These sections—§§ 132, 133, and 134 of the Act, 15 U.S.C. §§ 1642-44 (1976)—prohibit issuance of unsolicited cards, limit cardholders' liability for unauthorized use of their cards, and make fraudulent use of cards a federal crime. The language of these provisions shows that they apply to all credit cards, including business cards.[26]

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[26] The three provisions speak broadly in terms of regulations attaching to a "credit card" or in terms of the rights of a "card-

Moreover, in each case, Congress was addressing problems common to all types of cards. Among other things, the provisions concerning unsolicited credit cards were intended to prevent theft in the mails,[28] the provisions on limitations of liability were intended to provide card issuers with incentives to take precautionary actions against fraudulent use of credit cards,[28] and the provisions

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holder," defined in the 1970 amendments to mean "any *person* to whom a credit card is issued or any *person* who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person." 15 U.S.C. § 1602(m) (1976) (emphasis added). Because a person includes an "organization," defined to include a "corporation," 15 U.S.C. §§ 1602(c), (d) (1976), a "cardholder" for purposes of the 1970 amendments obviously extends far beyond an individual using a credit card for consumer purposes.

The fact that the 1970 amendments were incorporated in the Truth-in-Lending Act could not, by itself, lend much weight to the argument that they were intended to be subject to the business purpose exemption. Early legislative proposals would have placed these provisions under the Deposit Insurance Act, *see* H.R. 12646, 90th Cong., 1st Sess. (1967), or under Title 39 of the United States Code, which deals with the Postal Service, *see* H.R. 16542, 91st Cong., 2d Sess. (1970). It appears that the provisions were ultimately added to the Truth-in-Lending Act to assure administration of the provisions by the Federal Reserve Board, both because of the regulatory machinery already in place and because of the Board's regulatory jurisdiction over banks. *See* Hearings on S. 721 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 91st Cong., 1st Sess. 7-8 (1969) (Letter to Sen. Sparkman, Committee Chairman, from the Federal Reserve Board); *id.* at 14, 19-20, 28 (statement of Andrew Brimmer, Member, Federal Reserve Board, and comments by Sen. Proxmire); *id.* at 40-42 (statement of Paul Rand Dixon, Chairman, Federal Trade Commission, and comments by Sen. Proxmire).

[27] S. Rep. No. 739, 91st Cong., 2d Sess. 4 (1970); 116 Cong. Rec. 11828, 11833 (1970) (comments by Sen. Proxmire), *id.* at 11831 (comments by Sen. McIntyre); *id.* at 11841 (comments by Sen. Percy).

[28] S. Rep. No. 739, 91st Cong., 2d Sess. 5 (1970). *See* Hearings on S. 721 Before the Subcomm. on Financial Institutions of the

concerning fraud were directed against misuse of credit cards in general rather than the misuse of credit cards used for consumer purposes.[29]

The Federal Reserve Board found this intent implicit in the 1970 amendments and promulgated revisions to Regulation Z specifying that the new sections were not subject to the business purpose exemption. 37 Fed. Reg. 24337 (1972) (promulgation of amended regulation); 37 Fed. Reg. 16408 (1972) (proposal to promulgate amended regulation). After the Board recommended in its 1972 Annual Report that the Truth-in-Lending Act be amended to make the coverage of the business purpose exemption explicit, *see* 119 Cong. Rec. 4595, 4597 (1973), Congress passed § 135 expressly excepting the three 1970 amendments from the operation of the exemption.

Indeed, in making the business purpose exemption inapplicable to the three 1970 amendments, Congress recognized that one of the amendments created special problems for business credit card systems, and Congress therefore adopted special rules making the amendment in question applicable to business cards only in certain defined situations.[30] In contrast, the Court of Appeals deci-

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Senate Committee on Banking and Currency, 91st Cong., 1st Sess. 39-40 (1969) (statement of Paul Rand Dixon, Chairman, Federal Trade Commission); *id.* at 66 (statement of Robert Meade, Director, Legislative Affairs, President's Committee on Consumer Interests).

[29] 116 Cong. Rec. 11839-11840 (1970) (statements of Sen. Long upon introducing the fraud amendment).

[30] Section 135 provides as follows:

> The exemption provided by section [104(1)] does not apply to the provisions of sections [132], [133], and [134], except that a card issuer and a business or other organization which provides credit cards issued by the same card issuer to ten or more of its employees may by contract agree as to liability of the business or other organization with respect to unauthorized use of such credit cards without regard to the provisions of section [133], but in no case may such business or

sion would make all of the Fair Credit Billing Act applicable to business credit transactions involving individual liability without making any modifications in light of the special problems typical in the business context. *See infra* at 41-42.[31]

One of the 1970 amendments was the subject of two Court of Appeals decisions on which Respondent has relied extensively. In *American Airlines, Inc.* v. *Remis Industries, Inc.*, 494 F.2d 196 (2d Cir. 1974), and *Credit Card Service Corp.* v. *FTC*, 495 F.2d 1004 (D.C. Cir. 1974), the courts held that § 104(1) does not prevent the application of § 133 of the Act (limiting cardholder liability for unauthorized credit card use to $50) to business credit cards. The two cases, decided prior to passage of § 135 and later codified in that section, dealt only with the 1970 amendments to the Truth-in-Lending Act, not the 1974 amendments. Thus, they have no direct application to this case. Moreover, the reasoning of the two decisions is inapposite. As we have shown, the language, legislative history, and administrative construction of the 1970 amendments all show that Congress intended

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other organization or card issuer impose liability upon any employee with respect to unauthorized use of such a credit card except in accordance with and subject to the limitations of section [133].

[31] When the Federal Reserve Board, in its 1972 Annual Report, described its amendment to the regulation excepting the provisions concerning issuance of unsolicited cards, limits on liability, and fraud from the business purpose exemption, it took the position that the "amendments do not affect the business exemption in its application to the disclosure, rescission and advertising requirements." 119 Cong. Rec. 4595 (1973). *See also* 37 Fed. Reg. 24337, 24339 (1972) (promulgation of amended regulations); 37 Fed. Reg. 16408 (1972) (proposal to promulgate amended regulations). Thus, it intended the statutory amendments to have a similar limited effect. *See* 1972 Annual Report, *supra*, 119 Cong. Rec. at 4597. There is every indication that Congress agreed with the Board, for the Annual Report was included in the record at the time Senator Proxmire introduced the bill incorporating the Board's recommendation. 119 Cong. Rec. 4595 (1973).

for the 1970 amendments to apply to all credit cards, not just those issued for consumer credit purposes. By contrast, the language, legislative history, and administrative construction of the 1974 Fair Credit Billing amendments show that these provisions were to be fully subject to the business purpose exemption.

3. *The Administrative Interpretation of the Fair Credit Billing Provisions Confirms that They Are Subject to the Business Purpose Exemption.*

The Federal Reserve Board staff has specifically ruled on the precise issue involved in this case. In a letter cited but ignored below, the staff responded to an inquiry concerning the applicability of Fair Credit Billing Act requirements to company cards "used by employees to purchase goods or service required for the performance of their job." The staff took the position that "the requirements of Fair Credit Billing do not apply to card issuers" in such situations. Public Information Letter No. 1004, February 10, 1976, issued by D. Edwin Schmelzer.[32]

A proposed revision of Regulation Z containing a codification of previous staff interpretations has recently been promulgated by the Board pursuant to the Truth-in-Lending Simplification and Reform Act. Pub. L. 96-221, 94 Stat. 132 (1980). 45 Fed. Reg. 80648-738 (1980). This proposal, while not yet issued as a final regulation, reaffirms the staff's views as set forth in the 1976 interpretive letter. The proposal states:

> This regulation does not apply to the following:
>
> (a) *Business, commercial, agricultural, or organizational credit.* (1) An extension of credit primarily for a business, commercial or agricultural purpose.

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[32] *See also* Federal Reserve Board, 62d Annual Report of the Board of Governors of the Federal Reserve System at 335, 336 (1976) ("The Fair Credit Billing Act and its implementing regulations establish an error resolution procedure for *consumers* to utilize in resolving credit billing disputes promptly and fairly.") **(emphasis added).**

(2) Credit extended to organizations, including credit to governmental agencies or instrumentalities.*

* Extensions of credit that are exempt under paragraphs (a) (1) and (2) remain subject to the provisions governing the issuance of credit cards and the liability for their unauthorized use, as set forth in §§ 226.12(a) and (b).

45 Fed. Reg. 80697 (1980). Under this formulation, the exemption clearly applies to all the provisions of the revised Regulation Z other than the designated sections that are specifically expected. Because the Fair Credit Billing provisions are not among the excepted sections—pertaining to issuance of unsolicited cards and liability for unauthorized use of cards—they are fully subject to the exemption.

The formulation of the Fair Credit Billing provisions in the proposed regulation also makes clear the Board's view that these provisions apply only to consumer, and not business, transactions. These provisions are made applicable to "cardholders," as newly defined in the proposed regulations.[33] Interpreting the new definition, the Board states:

> The present proposal provides that a "cardholder" means a natural person to whom a credit card is

[33] The proposed regulations define "cardholder" as follows:

> *"Cardholder"* means a natural person to whom a credit card is issued upon the request or application of that person for consumer credit purposes, or a natural person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person. For the purposes of §§ 226.12(a) and (b) of Subpart B, "cardholder" also includes any person to whom a credit card is issued upon the request or application of that person for any purpose, including business, commercial, or agricultural use, or a person who has agreed with the card issuer to pay obligations arising from the issuance of such a credit card to another person.

§ 226.2(a), 45 Fed. Reg. 80695-96 (1980).

Proposed § 226.13, setting forth the provisions on billing error resolution, will apply to "consumers," and proposed § 226.2(a) defines "consumers" to include "cardholders" as defined above. 45 Fed. Reg. 80696 (1980).

> issued for consumer credit purposes or a natural person who is a co-obligor or guarantor for such a card. In addition, for the limited purposes of the requirements of the sections on issuance and liability of credit cards, a "cardholder" includes *any* person, including organizations, to whom a credit card is issued for any purpose, including business, agricultural, or commercial.

45 Fed. Reg. 80651 (1980) (emphasis in original). Because the Fair Credit Billing provisions are not among those subject to the broader definition of cardholder, only persons who are liable for credit cards issued for *consumer credit* purposes, defined to mean credit "primarily for personal, family or household purposes," [34] can claim the benefit of those provisions. Thus, according to the Board's interpretation, the Fair Credit Billing provisions are not applicable where the credit card is issued for business or commercial purposes even if a natural person holds the card.

The Board makes this explicit in its commentary on cards used for both business and personal purposes.

> When a card is issued to an individual for consumer purposes, the mere fact that an organization has guaranteed to pay the debt does not remove it from the coverage of the consumer credit sections of the regulation. On the other hand, *when a card is issued for business purposes, the fact that an individual uses it for consumer purchases does not subject the card issuer to the provisions on periodic statements, billing error resolution, and other consumer protections.*

45 Fed. Reg. 80651 (1980) (emphasis added).

The ruling of the Federal Reserve Board staff, affirmed by the Board in the proposed revision to Regulation Z, is entitled to decisive weight under *Milhollin*. See *supra* at 14.

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[34] Proposed Regulation § 226.2(a), 45 Fed. Reg. 80696 (1980).

B. The Business Purpose Exemption Is Readily Applicable to the Fair Credit Billing Provisions As They Apply to Business Credit Cards.

The Court of Appeals appeared doubtful that § 104(1) could be applied to the Fair Credit Billing provisions because "it is difficult to formulate a test for application of any business exemption" where a credit card may be used for both business and consumer purposes. (Pet. App. at 9a.) It rejected the test adopted by the district court on the ground that it would "be totally unwieldy," *citing American Airlines, Inc.* v. *Remis Industries, Inc.*, 494 F.2d at 201. (Pet. App. at 9a.) But the holding of the district court, even if it were not required by the explicit language and history of the Act, does not raise the problems suggested by the Court of Appeals.

The District Court ruled that in applying the § 104(1) exemption in this case, the purpose of the credit card should be determined on the basis of a " 'prospective predominant use' test, one applied at the opening of an account and based on the reasonably anticipated predominant use thereof." (Pet. App. at 12c.) The court also indicated that a presumption as to prospective predominant use could reasonably be established on the basis of the cardholder's status as an individual or a company and the nature of the liability involved:

> [W]e believe it may be reasonably said that, in the majority of credit card accounts opened in the name of individuals who assume sole liability for debts to be incurred, predominant usage for non-business purposes is contemplated. Short of a prospective expression by the parties involved negativing such an intent, these accounts should be characterized as consumer credit accounts. . . . Just as plainly, in the majority of accounts opened in the names of companies and relying in large part on company credit, such as the account involved in this litigation, it would be reasonable to anticipate predominant use

for business or commercial purposes. (Pet. App. at 12c.)

Under the plain language of the Truth-in-Lending Act, this ruling was correct. The applicability of § 104(1) to credit cards depends on the purpose for which the credit card account is opened. Section 104(1) exempts from the Truth-in-Lending Act "*credit transactions* involving extensions of credit for business or commercial purposes." (Emphasis added.) Because of the broad definition of credit included in the Act, it is clear that the opening of a credit card account is a "credit transaction."[35] It is to this transaction that the business purpose exemption should be applied.[36]

Notwithstanding the doubts of the Court of Appeals, there is no insuperable difficulty in determining the purpose for which a credit card account is opened. At any time a credit account of any type is opened, creditors are obliged to decide the purpose of the account in order to determine whether to make the required initial disclosures under Truth-in-Lending. It is not at all anoma-

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[35] As defined in the Act, credit includes not only the right to defer payment on a particular debt, but also the right to incur debts and defer payment of them. § 103(e), 15 U.S.C. § 1602(e) (1976); 12 C.F.R. § 226.2(q) (1980). Therefore, a credit card account—representing the "right to incur debts and defer payment on them"—constitutes "credit" for purposes of the Truth-in-Lending Act, and the opening of the account involves a credit transaction.

[36] In an analogous context, the Federal Reserve Board implicitly found that "the opening and use of an open end credit account or an entire credit account would be considered a single 'transaction.'" Federal Reserve Board, Annual Report to Congress on Truth-in-Lending for 1972, 119 Cong. Rec. 4596 (1973). The issue before the Board was the meaning of § 130 of the Act, concerning civil liability. In relevant part, § 130 provided that a $100 minimum liability attached to any credit transaction where proper disclosure was not made. 82 Stat. 157 (1968) (current version at 15 U.S.C. § 1640 (1976)).

lous for the credit card issuer to be required to make the same determination with respect to a credit card account.[37]

Indeed, the credit card issuer must know, at the time the account is opened, whether or not the Truth-in-Lending Act is applicable. The procedures used to service and maintain a credit card account must be in place when the account is opened. The procedures cannot change with each use of the card. Accordingly, the purpose for which the account is opened must as a practical matter determine whether § 104(1) will be applicable, even if the account is subsequently used at times for different purposes.[38]

The fact that some personal transactions may show up on a business account should not require a different result. Under both the Act and Regulation Z, consumer credit is defined to mean credit where the subject of the transaction is *primarily* for personal, family, household, or agricultural purposes.[39] § 103(h), 12 C.F.R. § 226.2

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[37] A similar determination must be made under Article 9 of the Uniform Commercial Code, which classifies goods used as collateral for a debt into one of four categories: consumer goods, equipment, inventory, or farm products. U.C.C. § 9-109. The classification required by Article 9 has been interpreted to depend on the purpose for which the goods will be used, evaluated prospectively as of the time the security agreement is signed. *See Cessna Finance Corp.* v. *Pivo*, 58 Cal. App. 3d 381, 129 Cal. Rptr. 888, 891 (1971); *Franklin Investment Co.* v. *Homburg*, 252 A.2d 95, 96-98 (D.C. Ct. App. 1969); *McGehee* v. *Exchange Bank & Trust Co.*, 561 S.W.2d 926, 930 (Tex. Ct. Civ. App. 1978); *Commercial Credit Equipment Corp.* v. *Carter*, 83 Wash. 2d 136, 516 P.2d 767, 769 (1973). Merchants have apparently had no problem in dealing with the test.

[38] Under the UCC, a change in the purpose for which a good is used after the security agreement is executed will not change the good's classification. J. White & R. Summers, Uniform Commercial Code § 23-13 at 823-24 (1972). The cases cited in n.37, *supra* all follow this rule.

[39] *See supra* at 10, 15.

(p) (1980). Thus, where a credit account is opened primarily or predominantly for a consumer purpose, a few business transactions on it will not invoke the business purpose exemption. *See Gallegos* v. *Stokes*, 593 F.2d 372, 375 (10th Cir. 1979); *Smith* v. *Chapman*, 436 F. Supp. 58, 61-62 (W.D. Tex. 1977), *aff'd*, 614 F.2d 968 (5th Cir. 1980). Likewise, a transaction that is predominantly for a business or commercial purpose should be exempt from the Act; exclusive business use is not required. As Senator Proxmire stated in congressional debate prior to passage of the Act, the "bill would not cover . . . credit extended *primarily* for business or commercial purposes." 113 Cong. Rec. 18401 (1967) (emphasis added). *See Redhouse* v. *Quality Ford Sales, Inc.*, 511 F.2d 230, 235 (10th Cir. 1975); *Tower* v. *Home Construction Co.*, 458 F. Supp. 112, 116-17 (S.D. Ala. 1978).

The presumption spelled out by the District Court reflects underlying commercial realities, for a business obviously must be obtaining credit cards for a business purpose, even if this purpose is only to provide benefits to the employees. Only if this were so could the business justify deducting the card fees as an ordinary and necessary business expense. 26 U.S.C. § 162(a) (1976). By contrast, it is reasonable to presume that a card issued to an individual who is solely liable will more likely be used predominantly for personal, family, or household purposes.

In sum, the Court of Appeals below was incorrect in suggesting that § 104(1) could not be applied to credit cards because of difficulties in formulating a test for application of "any business exemption." As the district court found, the § 104(1) business purpose exemption is readily applied to a credit card by evaluating the prospective predominant use for which the card account is opened.

III. BECAUSE OF IMPORTANT AND FAR-REACHING DIFFERENCES BETWEEN BUSINESS CREDIT AND CONSUMER CREDIT, THE COURT OF APPEALS ERRED IN APPLYING THE REGULATORY FRAMEWORK OF THE TRUTH-IN LENDING ACT TO BUSINESS CREDIT.

Business credit takes a wide variety of forms that bear scant resemblance to the more familiar varieties of consumer credit. For this reason, the Truth-in-Lending Act, which was designed with consumer credit in mind, cannot easily be applied in the context of commercial credit. Other regulatory provisions have also recognized the basic differences between the two types of credit and have declined to impose the same regulatory schemes on business credit that they impose on consumer credit.

Moreover, the distinctions drawn between business and consumer credit typically turn on the purpose of the lending transaction, not the identity of the borrower. The reason is simple: the differences between business and consumer credit turn not on the nature of the borrower but on the underlying economic needs of the parties to the transaction. The Fifth Circuit erred in failing to accord proper weight to these differences.

A. The Economic and Practical Realities Underlying the Extension of Business Credit Differ Markedly from the Realities of the Consumer Credit Industry, and This Difference is Commonly Recognized in the Law

Businesses obtain financing through a wide variety of credit arrangements. The type of credit selected will depend on a number of factors, including the size of the business borrower, the available sources of funds, and whether financial needs are long- or short-term. Small businesses, for example, rely particularly on trade credit, which is generally extended by suppliers to their cus-

tomers on a continuous basis.[40] J. Wert & G. Henderson, Financing Business Firms 240-45 (6th ed. 1979). Larger corporations often borrow funds on the open market by selling commercial paper, which is a short-term obligation in the form of a promissory note maturing generally in three to six months. *Id.* at 245-48. Both large and small businesses borrow from commercial banks and other financial institutions under a wide variety of forms and with wide variation in security arrangements. Banks may lend money under letters of credit (including those used in international trade transactions) or through the purchase (often with recourse) of receivables. Banks may provide financing for fixed assets through purchase and lease-back arrangements. *Id.* at 277. Longer-term loans may be accompanied by various security arrangements, including those requiring the pledging of certain assets or the maintenance of accounts with compensating balances. *See id.* at 248-54.

One of the most common security arrangements in the field of commercial credit is a requirement that the owners of a business accept personal liability for the loan. Such a requirement is particularly common in the case of closely-held corporations, small businesses, or new businesses without an established credit record. Without personal liability, such businesses would be unable to obtain credit at acceptable rates and in adequate amounts.

The primary purpose for requiring personal liability is to provide sufficient security for the business debt. *See* W. Hawkland, Commercial Paper 92 (2d ed. 1979). When the principals of a business assume personal liability, creditors are afforded additional security and reasonable protection against diversion of the business assets by those principals. *See* J. Weston & M. Goudz-

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[40] Goods may be sold under a variety of credit terms, or various consignment or agency arrangements may be used to allow the business purchaser to finance inventories.

waard, Treasurer's Handbook 129 (1976). Personal liability is particularly important in the context of closely-held corporations, which

> as a matter of tax policy, show minimum profits and operate with a nominal net worth. Salaries paid to the principal stockholders are often larger than net profits, and the real net worth is represented either by loans made to the company by its principals, or by the net worth of the principals themselves. In such cases, sound policy requires that debt to stockholders be subordinated formally to bank debt and the bank obtain the endorsement or guarantee of the principals (and their wives) as additional protection.

H. Crosse, Management Policies for Commercial Banks 218 (1962).

Moreover, personal liability is commercially valuable beyond providing security to the business creditor. In the credit card context, for example, when a company account is opened, the agreement of an individual employee to assume personal liability acts as a form of constraint upon abuse by that individual. Such constraints are significant for both large and small companies because they allow the companies to control the risks attendant upon the adoption of company-wide credit programs. Such companies are then able to negotiate with card issuers to allocate the risk of unauthorized card use among the card issuer, employees, and the employer in a commercially sensible manner. The ability to make such arrangements affects the cost, availability, and terms of credit made available to large and small businesses alike.

In contrast to commercial credit, consumer credit comes in more familiar forms. The home mortgage, the automobile loan, the unsecured personal loan, and the revolving credit plan (typically offered through bank and retail credit cards) are the most common types of consumer

credit. *See, e.g., Financial and Business Statistics*, 66 Fed. Res. Bull. A-38 to A-41 (Dec., 1980). Some financial institutions, such as finance companies, savings and loan associations, credit unions, and mortgage companies, specialize in consumer credit. Even commercial banks that engage in consumer transactions typically do so through separate consumer lending or credit card departments.

The business purpose exemption in the Truth-in-Lending Act is founded on these differences between business and consumer credit. The distinction between business and consumer credit is a common one and is recognized throughout the law in a variety of statutory and regulatory frameworks. As in the Truth-in-Lending Act, this distinction often turns on an analysis of the primary purpose of the lending transaction, not on the identity of the borrower.

For example, the distinction appears prominently in the 1976 Amendments to the Equal Credit Opportunity Act, which give the Federal Reserve Board authority to "exempt from one or more provisions of [the Act] any class of transactions not primarily for personal, family, or household purposes. . . ." 15 U.S.C § 1691b(a) (1976). Congress defined consumer credit in this amendment not by reference to the identity of the obligor, but by reference to a personal, family, or household purpose for the loan. Because the Act's requirements, written with consumer credit in mind, did not work in the context of commercial credit and placed undue burdens on various standard commercial practices,[41] Congress felt an exemption was appro-

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[41] As an example of the burdens imposed by the statute, Senator Garn cited the requirement that written reasons be supplied for credit rejections, stating that such a requirement:

> . . . was not fashioned in the light of commercial practice. Commercial credit involves the extension of credit between

priate. *See* S.Rep. No. 589, 94th Cong., 2d Sess. 11 (1976).

The recent Executive Order establishing federal credit controls and the provisions of the Uniform Consumer Credit Code (UCCC) illustrate the same points. Pursuant to the Credit Control Act, 12 U.S.C. § 1904 (1976), the President in March 1980 directed the Federal Reserve Board to regulate consumer credit in an effort to prevent and control inflation. *See* Exec. Order No. 12,201, 45 Fed. Reg. 17123 (1980).[42] Limitations on business lending were accomplished under a separate, voluntary program. *See* 45 Fed. Reg. 22883 (1980). The UCCC, which regulates aspects of consumer credit on the state level, also uses definitions distinguishing between consumer and commercial credit.[43] In both the credit control and UCCC con-

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merchants for inventory stock, plant equipment, and the like. The very nature of most business to business relationships means that purchases are made frequently and continuously, often without a lot of red tape. Making this provision applicable to business credit would be very expensive and place impediments in the way of commercial transactions. The additional expense and paperwork would be astronomical and would not contribute to the achievement of the purposes of the Act.

S. Rep. No. 589, 94th Cong., 2d Sess. 21 (1976) (Additional Views of Senator Garn).

[42] Consistent with the President's Order, the Board issued regulations requiring the maintenance of non-interest-bearing deposit accounts with the Federal Reserve by issuers of certain common forms of consumer credit, such as credit cards, personal loans, and overdraft credit plans offered by financial institutions. Credit extended for business purposes, regardless of the identity of the borrower, was specifically excluded from these regulations. *See* 45 Fed. Reg. 17927 (1980). Significantly, the regulations explicitly recognized that credit extended through the use of credit cards could be granted for either consumer or business purposes and excluded business use of credit cards from the deposit requirements. *See* 45 Fed. Reg. 17928 (1980).

[43] See U.C.C.C. §§ 1.301(12) (defining "consumer credit sale"); 1.301(15) (defining "consumer loan") (1974) text).

texts, the approach used in Truth-in-Lending is adopted: consumer and commercial credit are distinguished by reference to the purpose of the transaction, not by the identity of the obligor. In fact, the definitions of covered consumer credit transactions under the UCCC are almost identical to those in the Truth-in-Lending Act because of the mutual influence of the two statutes on each other.[44]

B. The Court of Appeals Was Not Free to Disregard the Distinction Between Business and Consumer Credit and to Rewrite the Truth-in-Lending Act Based on Its Own Concept of Equity

Courts are under an "obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history." *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979) *quoting International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 566 n.20 (1979). Here, it is clear beyond all serious doubt that a credit transaction having a business or commercial purpose is exempt from the Truth-in-Lending Act regardless of the identity of the obligor, with the limited and inapplicable exceptions previously discussed. In ruling that the business purpose exemption does not apply

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[44] *See Prefatory Note to 1968 Revised Final Draft* and *Comments to the Official 1974 Text*, VII U.L.A., Business and Financial Laws 240, 584 (1978). *See also* Warren & Larmore, *Truth in Lending: Problems in Coverage*, 24 Stan. L. Rev. 793, 795 (1972).

Under both the Truth-in-Lending Act and the UCCC, covered credit transactions must be made to a natural person; must be primarily for personal, family, or household purposes; and must be for less than $25,000 in most circumstances. *Compare*, 15 U.S.C. § 1602(h) (1976) and 15 U.S.C. § 1603(3) (1976) *with* U.C.C.C. § 1.301(12) (1974 text). The UCCC includes "agricultural purposes" within the definition of covered consumer credit transactions, although reference to "agricultural purposes" will be struck from the Truth-in-Lending Act, effective March 31, 1982. Truth-in Lending Simplification and Reform Act, §§ 603(a), 625(a), Pub L. 96-221, 94 Stat. 132 (1980).

where an individual assumes liability for the business debt, the Court of Appeals disregarded the language, purpose, and history of the Truth-in-Lending Act, as well as administrative interpretation of the Act and previous case law. Instead, the Court of Appeals relied upon its own concept of equity and the colorful old adage "You cannot have your cake and eat it too." (Pet. App. at 2a. *See also* Pet. App. at 10a.) But courts are not permitted to rewrite statutes to satisfy their own notions of fairness. As this Court has stated, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).[45]

Under the holding of the Fifth Circuit, the full regulatory framework of the Truth-in-Lending Act would apply whenever an individual is personally liable on a business debt. But the Act was designed only for consumer credit and cannot practically be applied in the commercial credit context. The specific disclosure requirements found in the Act and the regulations do not in many cases make sense in the commercial context. A number of specific examples illustrate the point.

Trade credit does not readily fit into the Truth-in-Lending framework. As the discussion above indicates, trade credit is often extended by suppliers to their customers on a more or less continuous basis and is frequently transacted informally with a minimum of paperwork. Whether or not the owners of a small business are personally liable to suppliers, the procedures used are the same. Customer orders for supplies, and accompanying extensions of credit by the supplier, often are made over

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[45] *See Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124 (1978); *Ferguson* v. *Skrupa*, 372 U.S. 726, 731-32 (1963); *Day-Brite Lighting* v. *Missouri*, 342 U.S. 421, 423 (1952).

the telephone. Purchase orders and invoices with preprinted terms may constitute the agreement and may be sent either before or after shipment. If Truth-in-Lending applied, however, the regulations would require that in most circumstances written disclosures be made before or at the time of the delivery of the property. *See* 12 C.F.R. § 226.8(g) (1980); 12 C.F.R. § 226.802 (1980) (Board Interpretation). Compliance with this requirement would be both unnecessary and burdensome, particularly in the case of customers and suppliers who have a long-standing relationship where the terms of the credit are well known to both parties.

Commercial lending by banks and other financial institutions is equally incompatible with Truth-in-Lending requirements. Regulation Z simply is not designed to deal with the complications of the wide variety of security and escrow arrangements that commercial lenders may require of business borrowers, whether or not personal liability attaches to the loans. For example, although Regulation Z contains provisions dealing with the maintenance of required deposit balances in the context of consumer loans, *see* 12 C.F.R. § 226.8(e) (1980), these provisions are simply inadequate to explain how disclosures would be made under many common commercial practices, which may include requirements that securities be pledged or delivered to the lender or that compensating balances of various types over varying periods of time be maintained.[46]

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[46] Although 12 C.F.R. § 226.8(e) (1980) provides four exceptions to the rule that deposit balances and other required investments must be excluded from the dollar amount disclosed as the amount financed, these four exceptions (including, *inter alia*, escrow accounts for taxes and insurance and pre-existing investments offered as security) were devised to meet common consumer lending situations and are not broad enough to embrace the wide variety of business credit arrangements. Thus certain investments maintained by a business borrower to satisfy the conditions of a business loan

The Truth-in-Lending framework is also difficult to apply in the business credit card area involved in this case. Billing systems designed for company card accounts, like the John E. Koerner & Co., Inc., company account, are different from those offered holders of non-business American Express cards, to whom the Truth-in-Lending Act applies. For example, companies with large numbers of employee cards issued on a single company account may request bills on microfilm or magnetic tape, or companies can elect an arrangement where statements for airline charges and/or annual card fees are sent directly to the company, while employees receive statements for all other charges and then obtain reimbursement from the company.

Applying the complications of Regulation Z to such billing systems would pose a number of difficult—and wholly unnecessary—problems. For example, present regulatory requirements detailing the size of type to be used on periodic statements or specifying that certain terms must be more prominently displayed than others, *see* 12 C.F.R. § 226.6(a) (1980), make no sense for bills sent on mag-

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might have to be excluded from the amount financed, thereby increasing the disclosed finance charge rate. For example, the value of securities not in existence at the date of the loan and subsequently delivered to the lender as collateral would have to be excluded from the amount financed if the regulation applied, while the exclusion would not be required if the securities pre-existed the date of the loan. *See* 12 C.F.R. § 226.8(e)(2)(iii) (1980). This distinction makes no sense in a business context.

The Truth-in-Lending Act is also not designed for applicability to commercial borrowing mechanisms such as the sale of commercial paper. Under the Act and the regulations, disclosure obligations are placed on the lender. *See* 12 C.F.R. § 226.8(a) (1980). But the "lender" in a commercial paper transaction is the buyer of the issuing corporation's note. In this context, the Act's lender disclosure scheme would make no sense. Although commercial paper is a form of commercial credit where personal liability is unlikely to be involved, it nevertheless provides another example of how the Act cannot easily be applied in the commercial context.

netic tape, or even on microfilm. Splitting a bill into two parts and sending a statement for a portion of the total to an employee while asking for the balance from the employer may be inconsistent with requirements for specifying an entire "new balance" on a single periodic statement. *See* 12 C.F.R. § 226.7(b)(1)(ix) (1980).

The billing error provisions, which are involved in this case, also raise problems. The record here shows that some of the errors alleged to exist in the Koerner company account related not to Respondent Koerner, but to other employees of the company. (J.A. at 35a, 40a-41a.) The errors were asserted not by Koerner, but by the company on company stationery. (J.A. at 38a, 43a.) Given situations in which thousands of cards—or even five cards—may be issued on a single company account, the existence of an alleged error with respect to any single card on the account might make it impossible for any other card to be cancelled while the dispute is being processed.

The solution to these problems is not to eliminate the requirement for personal liability on business credit cards. Personal liability serves a number of important commercial purposes, and sacrificing them would needlessly distort underlying economic realities. First, holding an employee personally responsible for debts on his company card protects against abuse of the card. Second, the availability of personal liability allows the card issuer and the employer to negotiate a division of liability for unauthorized use of business cards, as authorized under § 135 for business customers holding ten or more cards. *See supra* at 21-24. The ability to negotiate a division of liability has a direct effect on the cost and availability of credit to the company. Card issuers can be expected to agree to absolve companies from liability only if the card issuer has an alternative source from which to obtain payment in the case of unauthorized employee use of the card.

The regulatory structures designed for consumer credit cannot be engrafted onto commercial credit systems except at wholly unnecessary cost. Because requirements for personal liability serve important business needs, it would make no sense to require that such liability be avoided in order to assure exemption from consumer credit laws and the complicated compliance procedures that go with them. Neither Congress nor the Federal Reserve Board has mandated such a result, and the Fifth Circuit therefore erred in requiring it.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be reversed, and the judgment of the District Court reinstated.

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February 26, 1981

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ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. 80-202

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Should a credit card issuer be required to abide by the provisions of the 1974 Fair Credit Billing Act, 15 U.S.C. § 1666, before revoking the card of an individual who is liable as a principal on a business credit card, when the card is unrestricted as to use and has been used for mixed business and personal purposes?*

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* Louis R. Koerner, Sr. and John E. Koerner & Company, Inc. have no parent companies, subsidiaries, or affiliates that are required to be disclosed pursuant to Rule 28.1 of the Rules of this Court, other than the following: Koerner Domestic Import Sales Corporation.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. 80-202

AMERICAN EXPRESS COMPANY,
Petitioner

v.

LOUIS R. KOERNER, SR.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT

Respondent, Louis R. Koerner, Sr., respectfully submits this, his Brief in response to the Brief for Petitioner in the above-styled action, and further respectfully prays that this Court affirm the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered April 7, 1980.

STATEMENT OF THE CASE

Contrary to the assertion of the American Express Company, the question presented by this case is not as broad as Petitioner would

have this Court believe. The question is not whether the Truth-in-Lending Act applies to business loans secured by an individual's personal liability.

Rather, the question presented by this case is whether a credit card issuer should be required to abide by the provisions of the 1974 Fair Credit Billing Act, 15 U.S.C. § 1666 before revoking the credit card of a natural person who has signed as jointly and severally liable for the business and personal debts incurred thereon, when the card is unrestricted as to use and has been used for mixed personal and business use.

The decision of the Court of Appeals will have absolutely no effect whatsoever upon the vast majority of business credit transactions in this country. It will merely require a credit card issuer, such as Petitioner, either to specify that a particular credit card may only be used for business purposes without liability on a "consumer" as principal, and thereby is exempted from the provisions of the Truth-in-Lending Act by application of 15 U.S.C. § 1603, or to follow the provisions of the Act for credit cards issued to individual consumers for personal or "mixed" use.

The facts which gave rise to the instant litigation are as follows. On November 16,

1965, the corporation, John E. Koerner & Company, Inc., [hereinafter referred to as "the Company"] made an "APPLICATION FOR CREDIT CARD | COMPANY ACCOUNT" to American Express [J.A. 27a]. In this application and in the "APPLICATION FOR SUPPLEMENTARY CREDIT CARD Company Account (Combined Billing)," signed the same day, the following statement was made:

> The undersigned individual and company join in this application and assume joint and several liability for all charges incurred prior to return of Credit Card to American Express Company. The applicants agree to be bound by the terms and conditions accompanying the Credit Card, if this application is accepted and a Credit Card issued [emphasis supplied].

J.A. 27a, 28a.

In the space marked "SIGNATURE OF INDIVIDUAL APPLICANT," the signature of John E. Koerner, Jr. was entered [J.A. 27a]. Also on November 16, 1965, Louis R. Koerner, Respondent herein, a company officer, completed a form labeled "Application for Supplementary Credit Card, Company Account." Respondent signed beneath and agreed to the same terms quoted above. The applications were approved, the account was opened, and cards were issued to and in the name of John E. Koerner, Jr. and to and in the name of Louis R. Koerner, Re-

spondent herein.

Respondent used the card for both personal and business purposes [J.A. 41a]. Although there was a single billing and all charges were billed to the Company, the bills contained itemized statements of the individual accounts. Mr. Koerner remitted payment directly to American Express for a number of non-business, consumer transactions with personal checks drawn on his own account. The last of these personal checks was dated September 2, 1976, the same month as the incident in question [J.A. 42a].

In 1975, a billing dispute arose over the following charges included on the combined statements sent to the company:

> (a) Three debits in the amount of $3.00 each and one debit in the amount of either $3.00 or $6.00 for charges made by Mr. Koerner in July, August, September, and October of 1975 for air flight insurance for trips conducted for business purposes.
>
> (b) A debit of $20.00 representing, according to Respondent, "a charge for Mr. John E. Koerner's card which was returned and for which credit was never given." This was a renewal fee for a card no longer desired.
>
> (c) A debit of $20.00, ultimately cancelled by a credit which Respondent asserted was "a charge for a card of Ralph E. Koerner." The nature of the charge has

not been established.

The dispute remained unresolved through September 28, 1976. On that date, Respondent was asked to speak by phone to a representative of American Express when he attempted to use his card for the purchase of an airline ticket at the New Orleans International Airport. Following the conversation with the representative, Mr. Koerner was presented with his credit card cut in two. The purpose of the trip for which the ticket was to be purchased was business related. However, there was no extension of credit because of the card revocation.

Respondent filed suit in November of 1976 against Petitioner, the American Express Company, alleging that Petitioner violated the provisions of 15 U.S.C. § 1666, in that it wrongfully revoked Respondent's credit card as a result of a billing dispute. Petitioner filed a Motion for Summary Judgment on the grounds that the statute, 15 U.S.C. § 1666, does not apply to transactions of a business or commercial nature pursuant to 15 U.S.C. § 1603. The United States Magistrate rendered his initial report, recommending that the Motion be granted. The District Court, the Honorable Edward J. Boyle, Sr., affirmed the

decision [444 F.Supp 334], and in so doing, dismissed other pendent state claims which were dependent upon federal jurisdiction under 15 U.S.C. § 1666.

Respondent filed a Motion for New Hearing and to Alter or Amend Judgment and/or for a New Trial, which motion was denied by District Judge Boyle on January 4, 1978.

On appeal, the Fifth Circuit Court of Appeals, Wisdom, J., reversed and remanded the case [615 F.2d 191 (5th Cir. April 7, 1980), Pet. App. 1a], holding that the provisions of the Truth-in-Lending Act dealing with the correction of billing errors and requiring that a credit card issuer take certain steps before restricting or closing a credit card account were applicable to an individual cardholder who was jointly and severally liable with his employer for the debts charged to the card.

The holding of the Fifth Circuit is limited to an interpretation of one section of the 1974 amendments to the Truth-in-Lending Act, 15 U.S.C. § 1666, and does not in any way threaten to disrupt the business credit transaction exemption that governs the broad range of commercial practices to which Petitioner refers. Such credit transactions are the subject of the original 1968 Truth-in-Lending Act, and nothing in the decision in the pre-

sent case nullifies the effect of the 15 U.S.C. § 1603 business and commercial exemption as it pertains to those transactions.

SUMMARY OF ARGUMENT

I.

Having joined in the application and assumed solidary liability for the personal and business debts incurred on the card, Louis R. Koerner was a principal debtor. He was not, as Petitioner has attempted to portray, merely a surety or continuing guarantor, for the Company. The use by Mr. Koerner of his credit card can not therefore be viewed as an extension of credit solely to John E. Koerner & Company.

II.

An individual cardholder who is liable as a principal for personal or mixed uses of his credit card should be classified as a consumer and be afforded the protections provided by the 1974 Fair Credit Billing Act.

III.

The classification of a natural person who is principally liable for both personal and business uses of his credit card is consistent with the definition of "consumer" as provided by the Truth-in-Lending Act, as well as with the judicial rule that the Act is to be construed liberally in favor of the consumer.

IV.

The decision of the Fifth Circuit Court of Appeals is consistent with all properly reasoned prior administrative interpretations.

V.

The effect of the Fifth Circuit's decision or of the application of 15 U.S.C. § 1666 to business credit cards unrestricted as to use will be minimal on the majority of business credit transactions in this country.

VI.

Any attempt to categorize the extension of credit on a credit card as business or personal by its "prospective predominant" or "predominant" use has been shown to be unwieldy and unworkable. Accordingly, the provisions of 15 U.S.C. § 1666 should be applicable to all credit card transactions, whether personal or business.

ARGUMENT

I. PETITIONER HAS MISSTATED THE ISSUE PRESENTED TO THE COURT IN THE CASE AT BAR

Like Petitioner, we begin our analysis with the language and the legislative history of the Truth-in-Lending Act. The specific purpose of the original Act, as stated in 15 U.S.C. § 1601, is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the

various credit terms available to him and avoid the uninformed use of credit." Because the Act was designed as a consumer protection statute, exemptions were allowed for corporate debtors and individuals who secure credit for business or commercial purposes. These debtors were thought to be amply sophisticated to make informed judgments as to the value of alternative credit plans and to be able to negotiate beneficial credit terms, so as not to require the special disclosure protections provided by the Act. See, Warren & Larmore, Truth in Lending: Problems of Coverage, 24 Stan. L. Rev. 793, 809-10 (1972). The Report of the Senate Committee on Banking and Currency states in pertinent part:

> Most businesses or corporations are in a good position to judge the relative worth of alternative credit plans and by and large do not require the special disclosure protection provided by the bill.

S. Rep. No. 392, 90th Cong., 1st Sess. 7 (1967).

Accordingly, 15 U.S.C. § 1603 exempted "credit transactions involving extensions of credit for business or commercial purposes or . . . to organizations [defined to include corporations and partnerships]." This exemption remains in full force insofar as it concerns the provisions of the 1968 Act. In

the instant case, Respondent in no way challanges the effect of this exemption upon the vast majority of business credit transactions.

Contrary to the assertion of the American Express Company that the Fifth Circuit opinion would apply the provisions of the Truth-in-Lending Act to every extension of credit for which an individual may be liable, the scope of the case at bar and of the decision of the Fifth Circuit is strictly limited to an interpretation of one section of the 1974 amendments to the Truth-in-Lending Act, specifically 15 U.S.C. § 1666, the amendment dealing with the settlement of billing disputes in credit card transactions. For the reasons discussed below, the Fifth Circuit opinion was well-considered, and the effect of the decision on business credit transactions in the United States will be minimal, at most.

II. RESPONDENT WAS SOLIDARILY LIABLE FOR THE DEBTS INCURRED ON HIS CREDIT CARD, AND WAS NOT MERELY A SURETY FOR JOHN E. KOERNER & COMPANY

Throughout this litigation, the American Express Company has attempted to categorize Mr. Koerner as a surety or guarantor of the debts of John E. Koerner & Company. American Express has consistently argued that the Company was ultimately responsible for any debts

incurred upon the credit card. See, e.g., J.A. 25a and 26a; Pet. App. 10a.

By arguing that Respondent was merely a surety for the Company and thus that the Company alone assumed primary responsibility for the debts incurred on the card, Petitioner could then attempt to draw the conclusion that the debts must be "extensions of credit for business or commercial purposes" and therefore argue that they are not subject to the provisions of 15 U.S.C. § 1666 because of application of the business or commercial exemption. Such a characterization of the relationship between the company and Respondent is not accurate, as the Fifth Circuit indicated in its opinion [Id.] Accordingly, the characterization of the purpose for which the card was used is also not as simplistic as Petitioner would have this Court believe.

Respondent joined in the application for the credit card and assumed "joint and several liability" for all debts incurred. By so doing, Respondent became a principal debtor of the Petitioner, with the consequent legal ramifications discussed below.

As is set forth hereinafter, Louisiana law distinguishes the legal consequences of suretyship and in solido liability.

The Louisiana Civil Code articulates the

nature and extent of suretyship in La. C.C. Art. 3035 et seq. Article 3035 provides as follows:

> Suretyship is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not. [Emphasis added]

La. C.C. Art 3035. The language of Article 3035 and the cases which have applied it clearly indicate that the surety is but secondarily liable on the debt of the principal debtor, and need only satisfy the debt if the principal debtor does not. In American Indemnity Co. v. Robertson, 309 So.2d 737 (La. App. 4th Cir. 1975), the Louisiana Court of Appeals wrote:

> This fundamental principle of suretyship is embodied in LSA -- C.C.P. Article 2124, the pertinent part of which provides:
>
> A suspensive appeal bond shall provide, in substance, that it is furnished as security that the appellant will prosecute his appeal, that any judgment against him will be paid or satisfied from the proceeds of the sale of his property, or that otherwise the surety is liable for the amount of judgment. [Emphasis supplied by Robertson Court].

Id. at 738.

Continuing its analysis of the nature of suretyship, the Fourth Circuit Court of Ap-

peals of Louisiana wrote:

> [LSA -- C.C.P. Article 2124] is consistent with the codal provision which states that no suit shall be instituted against any surety on any appeal bond "until the necessary steps have been taken to enforce payment against the principal." LSA -- R.C.C. Article 3066. . . .
>
> * * * *
>
> . . . a surety becomes liable only where it is shown that there is insufficient property of the debtor to satisfy execution.
>
> * * * *
>
> . . . The surety . . . is not bound to pay until all of the property, both personal and real, of the judgment debtor is first exhausted. William D. Seymore Co. Inc. v. Castell, 13 La.App. 365, 125 So. 896 (Orl. App. 1930).

Id. at 738-39.

Similar analysis has been given to the relationship of a principal debtor to a continuing guarantor. In Bonura v. Christiana Bros. Poultry Co. of Gretna, Inc., 336 So.2d 881 (La. App. 1976), writ refused 339 So.2d 11, application not considered 339 So.2d 26, the Court unequivocally stated:

> [A] contract of continuing guaranty is equivalent to a contract of suretyship. See Brock v. First State Bank & Trust Co., 187 La. 766, 175 So. 569, 570 (1937). As such, rights and obligations arising from it are accessory to the principal obligation. LSA -- R.C.C. 3035.

336 So.2d at 884.

Were the relationship between the company and Mr. Koerner one of principal debtor/surety or principal debtor/continuing guarantor, as Petitioner would like the relationship to be characterized, it could be contended that, as the sole principal debtor, the company applied for and was issued a credit card solely for business purposes. According to such an analysis, the exemption of 15 U.S.C. § 1603 would then be triggered, and the provisions of 15 U.S.C. § 1666 would not apply. As the Fifth Circuit noted below, however, the relationship between the company and Respondent was not one of principal debtor/surety, but was one of solidary liability. By assuming solidary liability, Respondent himself became a principal debtor of the Petitioner.

The Louisiana Civil Code provides, in Article 2091, that:

> There is an obligation in solido on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor.

La. C.C. Art. 2091. Although Louisiana Civil Law employs the term "in solido" liability instead of the common law term "joint and several" liability, the two terms are synonymous in Louisiana for the purpose of classification

of the obligation as one "in solido." In Johnson v. Jones-Journet, 320 So.2d 533 (La. 1975), the Louisiana Supreme Court explained that "[i]n Louisiana, the common law term 'joint and several' is considered synonymous with the civil law term 'in solido'." Id. at 536. See also id. at n. 13, and Ford Motor Credit Co. v. Soileau, 323 So.2d 221, 225 (La. App. 3rd Cir. 1975).

When Louisiana debtors are liable in solido, the creditor may recover the entire debt from any one of the debtors. As Article 2094 of the Louisiana Civil Code provides:

> The creditor of an obligation contracted in solido may apply to any one of the debtors he pleases, without the debtors having a right to plead division.

La. C.C. Art. 2094. Louisiana jurisprudence has uniformly held that the creditor has the choice of which of his solidary debtors he will collect the debt from, since all solidary debtors are liable to the creditor for the entire debt. In 1969, the First Circuit Court of Appeals of Louisiana, in Cunningham v. Hardware Mutual Casualty Co., 228 So.2d 700 (La. App. 1st Cir. 1969), stated:

> Liability in solido, whether emanating from tort or contract, means that either of the debtors may be required to discharge the obligation in full at the creditor's election. La. R.C.C. Articles

2094 and 2103. [Emphasis in the original].

Id. at 705.

The Second Circuit Court of Appeals of Louisiana approached the question from the debtor's perspective when, in Central Bank v. Winn Farmers Co-operative, 299 So.2d 442 (La. App. 2nd Cir. 1974), it wrote:

> By its very nature contractual solidary liability deprives the obligors of the right to claim benefits of the remedy of division, which requires the obligee to divide his claim against the debtors and collect as if each of the debtors was liable only for his virile [proportional] portion.

Id. at 445.

The facts of the case at bar clearly show that Respondent was solidarily liable for the debts incurred on his credit card, and was not merely a surety for the Company, as Petitioner has argued. As such, American Express could elect to recover any and all debts incurred on the credit card directly from Mr. Koerner, without Respondent being able to plead division. To be sure, Mr. Koerner could sue the Company for contribution under La. C.C. Article 2103 for any business expenditures, or could have signed some form of repayment agreement with the Company. However, as the Fifth Circuit noted below, the ability of Re-

spondent to recover his payments from the Company depended upon the existence of an agreement between them and the company's continued solvency. It in no way affected the right of American Express to recover its debt directly from Respondent upon its own election.

Whatever the rule in Common Law jurisdictions, in Louisiana, at least, Mr. Koerner was a principal and not merely a surety.

Having determined therefore that Respondent, on account of the Civil Law concept of obligations in solido, was primarily liable for the debts incurred on his credit card, it becomes evident that the transactions involved herein cannot be classified merely as extensions of credit to a business to be contended to be exempt from the Truth-in-Lending Act by application of 15 U.S.C. § 1603. The credit card transactions were, at best, extensions of credit to an individual -- an individual consumer, as we shall soon explain -- and as such, do not immediately fall into the exemption category of credit transactions without further examination. That examination is the subject of Part III below.

III. CLASSIFYING CREDIT CARDHOLDERS WHO USE THEIR CARDS FOR BOTH PERSONAL AND BUSINESS PURPOSES AS CONSUMERS IS CONSISTENT WITH THE PROVISIONS OF THE ACT.

Petitioner frames the issue in this case,

and indeed spends the major portion of its Brief arguing that the exemption to the Truth-in-Lending Act for business or commercial debts applies to individuals who secure credit for business or commercial purposes. As stated earlier, the question here presented is not as broad as Petitioner contends. The problem which arises in this case results from the difficulty in isolating the "credit transaction" in the context of the credit card amendments, and then categorizing that "credit transaction" as either business or personal.

The penultimate question, before deciding whether or not the 15 U.S.C. § 1603 exemption could apply in a given case, is whether an individual who secures credit, through the use of a credit card, for both personal and business uses should be considered a consumer within the meaning of 15 U.S.C. § 1666, or a business debtor within the contemplated limits of the business or commercial exemption. Respondent contends, and the Fifth Circuit below held, that Mr. Koerner should be considered a consumer, and thereby be entitled to the protection provided by the 1974 Fair Credit Billing Act.

Because of the narrowness of the issue presented by this case, the cases cited by Petitioner for the proposition that the busi-

ness or commercial exemption may apply to individuals are inapposite. These cases deal with extensions of credit which are, without dispute, contemplated by the 1968 Act, such as commercial loans, Poe v. First National Bank of DeKalb County, 597 F.2d 895 (5th Cir. 1979), Weingarten v. First Mortgage Co., 466 F.Supp. 349 (E.D. Pa. 1979); mortgages for the acquisition or improvement of commercial property, Adema v. Great N. Dev. Co., 374 F.Supp. 318 (N.D. Ga. 1973), Puckett v. Georgia Homes, Inc., 369 F.Supp. 614 (D.S.C. 1974), Sapenter v. Dreyco, Inc., 326 F.Supp. 871 (E.D. La.), aff'd, 450 F.2d 941 (5th Cir. 1971), cert. denied, 406 U.S. 920 (1972), Tower v. Home Const. Co. of Mobile, Inc., 458 F.Supp. 112 (S.D. Ala. 1978); or, with extensions of credit not usually so contemplated, such as loans for the purchase of personal automobiles, Gallegos v. Stokes, 593 F.2d 372 (10th Cir. 1979), Smith v. Chapman, 436 F.Supp. 58 (W.D. Tex. 1977), aff'd, 614 F.2d 968 (5th Cir. 1980), Vines v. Hodges, 422 F.Supp. 1292 (D.D.C. 1976).

The credit transactions involved in the cases cited by Petitioner (none of which involved credit cards) were, in general, easily classified as transactions for business or commercial purposes, or as transactions for

"personal, family, household, or agricultural purposes," and, as part of the 1968 Act, were exempted by 15 U.S.C. § 1603 when classified as the former. Were credit card transactions easily classified as "extensions of credit for business or commercial purposes" or as transactions for "personal, family, household, or agricultural purposes," there would be no dispute and, indeed, this case would not be currently before this Court. However, the uniqueness of credit card usage to credit transactions generally makes easy classification elusive.

A bright line rule is needed which would prevent the harassment of consumers by credit card issuers, thereby giving meaningful effect to the intent of Congress in enacting the 1974 amendments, and which, at the same time, would avoid the needless uncertainty and considerable litigation brought on by the adoption of a predominant use test. One such rule, which would preserve the personal/business dichotomy of 15 U.S.C. § 1603 as to credit cards, would require credit card issuers to restrict the use of certain credit cards to business or commercial purposes. All credit cardholders whose cards are not so restricted, who therefore use or could use their cards for solely personal, or for both personal and business

purposes, and who are liable "in solido" or as a principal, would be classified as consumers under the provisions of 15 U.S.C. § 1666, and would thus be accorded its protections.

The Fifth Circuit Court of Appeals based its decision on the narrow ground that, because Respondent had joined in the application and had assumed joint and several [in solido] liability for the debts incurred on the card, he was a principal debtor, as well as a consumer. Since Petitioner could recover its debts [including consumer debts] directly from a consumer, the Court of Appeals held that the Petitioner must abide by the provisions of the Truth-in-Lending Act regulating the correction of billing errors in a consumer's credit card statement. As the Fifth Circuit observed, "The credit card company cannot have it both ways: If it does not want to be bound by consumer lending requirements, then it should not be allowed to collect its debts from a consumer." 615 F.2d at 195-96, Pet. App. 10a.

The classification by the Fifth Circuit of Mr. Koerner as a consumer is not haphazard, nor is the term "consumer" synonymous with the term "individual." "Consumer" has a specific definition within the framework of the Truth-in-Lending Act. The definitional section of the Act states:

> The adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.

15 U.S.C. § 1602(h).

Respondent contends, and the Fifth Circuit agreed, that Mr. Koerner properly should be classified as a consumer within the meaning of 15 U.S.C. § 1602(h). Regarding the first part of the definition -- that the party to whom credit is extended be a "natural person" -- Respondent has demonstrated that, by joining in the application and assuming "joint and several liability" for any debts incurred on the card, he became a principal debtor to Petitioner. As a principal debtor and a natural person, Respondent clearly fits within the first part of 15 U.S.C. § 1602(h). See also Public Information Letter No. 727, November 13, 1973, 5 CCH Consumer Credit Guide ¶ 31,045, Pet. App. 3g.

Regarding the second portion of the definition -- that the money, property, or services which are the subject of the transaction be primarily used for personal, family, household, or agricultural purposes -- many of the

uses of the card were for just such purposes [J.A. 42a-43a]. Mr. Koerner dealt directly with American Express with respect to many of the transactions, remitting payments accepted by American Express by means of personal checks drawn on his own account even as late as the same month as the wrongful revocation.

The Court of Appeals recognized that its decision prevented application of the business exemption of 15 U.S.C. § 1603 to 15 U.S.C. § 1666 when a consumer is liable for both personal and business uses of the card, but stated that this result is in consonance with the purpose of the Fair Credit Billing Act of 1974 -- protecting consumers from the harrassment of creditors. See S.Rep. No. 278, 93d Cong., 1st Sess. 1-2, 4-6 (1973); S.Rep.No. 750, 92d Cong., 2d Sess. 1-4 (1972).

While the Court of Appeals may not have wished to resolve the issue of whether corporate transactions and transactions for business or commercial purposes are protected by the 1974 amendments dealing with credit cards, its decision protecting individuals who may be liable for "mixed" debts incurred on their credit cards was the minimum appropriate solution. It is the individual consumer who is subjected to the harrassment and embarrassment which the amendments are designed to prevent.

The proper method of protecting the consumer from such harrassment is to apply the protections of 15 U.S.C. § 1666 to any individual who is personally liable, as a principal, for both personal and business debts incurred on the card.

The Fifth Circuit's classification of Mr. Koerner as a consumer within the language of the Truth-in-Lending Act was correct, in light of the fact that he was principally liable for any personal debts (his capacity vis-à-vis American Express to incur them being unlimited), as well as business debts incurred on his card. If the business exemption is to apply at all to the 1974 credit card amendments, it should be applied only to those cards which have been restricted solely to use for business purposes. Such a rule of decision would set up a simple and straightforward test, which would be non-technical and easily understood when disclosed, and which could be applied in all situations with a minimum of difficulty.

IV. THE DECISION OF THE FIFTH CIRCUIT IS CONSISTENT WITH ALL PROPERLY REASONED PRIOR ADMINISTRATIVE INTERPRETATIONS

The Fifth Circuit did not apply § 1666 to all credit cards. Therefore, the contention of a conflict with prior administrative inter-

pretations of § 1666 and § 1603 is without merit.

This false issue is raised by the American Express Company as the contention [Brief for Petitioner 25 and n. 25] that the Court of Appeals violated the holding of this Court in Ford Motor Credit Company v. Milhollin, 444 U.S. 555 (1980), by disregarding a Federal Reserve Board staff opinion which stated that the Truth in Lending Act would not apply to a business card for solely business credit, i.e. No. 1004, February 10, 1976, infra.

While the Fifth Circuit recognized that the interpretive letter should be given great weight, however, the Court of Appeals found that the Federal Reserve Board regulations and the language of § 1666 supported a position that § 1666 should apply to transactions for business or commercial purposes or transactions involving extension of credit to corporations [Pet. App. 9a]. In light of the practical difficulties in formulating a test for classifying a particular credit card as either for business or personal use, the Court found the conflicting interpretations weighed in favor of protecting all individuals who may be liable for the debts incurred on their credit cards, regardless of the purpose of use.

However, after this detailed analysis and

the foregoing conclusion in dicta, the Court of Appeals declined to base its decision on this reasoning, but on a narrower ground.

> Koerner signed a statement joining in the application and assuming joint and several liability for any debts. Therefore, American Express could recover from him or from the company. If it can recover from a consumer, then it must abide by the requirements of § 1666 for correction of billing errors in a consumer's credit card statement. The credit card company cannot have it both ways: If it does not want to be found by consumer lending requirements, then it should not be allowed to collect its debts from a consumer.

Pet. App. 9a-10a.

American Express seems to misapprehend the actual holding of the Court of Appeals, and still seeks to battle the windmill of application of § 1666 to all credit cards.

A careful examination of the six letters cited by Petitioner reveals that the actual decision of the Court of Appeals is consistent with every one of the Public Information Letters of the Federal Reserve Board (reprinted in Pet. App. 1g, et seq.), as follows:

1. No. 277, March 10, 1970, 5 CCH Consumer Credit Guide ¶ 30,318 (Pet. App. 1g) involved a corporate customer and a corporate business loan but with an individual surety. Clearly this would be excluded by the test of the Court of Appeals because of the lack of a consumer as principal. Accordingly, this letter is consistent.

2. No. 663, January 23, 1973, 5 CCH Consumer Credit Guide ¶ 30,934 (Pet. App. 2g) involved a commercial loan secured by personal antiques. In that situation, there was no consumer liabililty whatsoever, and this letter provides no guidance.

3. No. 727, November 13, 1973, 5 CCH Consumer Credit Guide ¶ 31,045 (Pet. App. 3g) see discussion hereinafter. The date of this letter is incorrectly set forth in the Brief for Petitioner as November 13, 1975 (p. 15), although it is correctly dated at Pet. App. 3g and in the table of Authorities of Petitioner.

4. No. 751, January 14, 1974, 5 CCH Consumer Credit Guide ¶ 31,070 (Pet. App. 4g) involved a loan for the husband's exclusive business purposes, but secured by the family home. Since there was no consumer liabililty whatsoever, this letter is not applicable.

5. No. 821, July 18, 1974, 5 CCH Consumer Credit Guide ¶ 31,143 (Pet. App. 5g), see discussion hereinafter.

6. No. 1004, February 10, 1976, 5 CCH Consumer Credit Guide ¶ 31,338 (Pet. App. 7g), see discussion hereinafter.

Public Information Letter No. 727, November 13, 1973, 5 CCH Consumer Credit Guide ¶ 31,045, preceded American Airlines, Inc. v. Remis Industries, Inc., 494 F.2d 196 (2d Cir. 1974) and In re Credit Card Service Corp. d/b/a Credit Card Service Bureau, 82 F.T.C. 191, 209-11 (1973), affirmed and enforced sub

nom. Credit Card Service Corp. v. Federal Trade Commission, 495 F.2d 1004 (D.C. Cir. 1974). Its suggestion of a "predominant use" examination is inconsistent not only with these cases but with the contention of the American Express Company that the 1970 Amendments applied to all credit cards, business or consumer [Brief for Petitioner 24-25]. However, the letter is interesting because it involves a credit card agreement with the same language as that involved in the present case, to wit: "both the employer and the employee are jointly and severally liable on all obligations incurred under the account."

The specific question posed was whether a periodic billing statement, involving § 226.7(b) of Regulation Z, issued under the 1970 Fair Credit Billing Act required the issuer to send a periodic billing statement to the employee as well as to the employer (which is an available option from American Express, Brief for Petitioner 40). This is, of course, a section different from that involved in the present case. Periodic billing is part of the "extension of credit," while Remis, supra, Credit Card Services Corp., supra, and the present case involve portions of the Fair Credit Billing Act governing obligations of the issuer in situations other than those

involving the extension of credit.

The language of the letter is in basic agreement with the Fifth Circuit's determination that the language of Petitioner's credit card agreement constituted the granting of credit to both the employer and consumer as joint principals. As stated by the author of the letter:

> The key question seems to be to whom credit is extended, and whether it is "consumer credit" as opposed to business credit.

The letter then pin points the issue considered by the Court of Appeals in the present case, by the Second Circuit in Remis, and by the D.C. Circuit in Credit Card Services, to wit: "if credit is extended to the employee as well as the company, the question arises as to whether the credit is for business or commercial purposes, or whether it is primarily for personal, family, household, or agricultural purposes." This is because "if the purpose of the credit is mixed but primarily for personal, family, household or agricultural purposes, the credit would be subject to the Truth in Lending's provisions."

The final paragraph begins: "If the account does fall within the disclosure provisions of the Regulation, . . .," but does

not provide resolution of the issue of determining "predominant" personal use. This letter was issued prior to the 1974 Amendments and prior to rejection of the "predominant use" test by Remis, supra, and Credit Card Services, supra. Moreover, the writer clearly does not understand American Express's contention, discussed, infra, that the 1970 Amendments were intended to cover all credit cards, including business cards.

This letter provides support for the determination by the Court of Appeals that Mr. Koerner was a "consumer" to whom credit was extended and does not support the position taken by American Express that Mr. Koerner was merely a surety owed no consumer duties. In the absence of an administrative resolution of the issue that is contrary to the position taken by the Fifth Circuit, this letter does not rise to Milhollin status. Furthermore, a consideration of the very issue under the 1974 Amendments should be no different. According to American Express,

> [T]he language, legislative history, and administrative construction of the 1970 amendments all show that Congress intended for the 1970 amendments to apply to all credit cards, not just those issued for consumer credit purposes. [Brief for Petitioner 24-25].

Since the foregoing adminstrative inter-

pretation rationally established the status of Mr. Koerner as that of a "consumer" and an "obligor," who is a natural person, then No. 821, July 18, 1974, 5 CCH Consumer Credit Guide ¶ 31,143 provides additional positive support to the position of the Court of Appeals. This letter discusses the business exemption as applied to a non-credit card situation -- there to a single securities "transaction" with an individual.

> It is difficult to draw a clear line between credit for personal, family, household, or agricultural purposes and credit for business or commercial purposes where the obligor is a natural person. In situations where there is an element of doubt as to what course to follow, it would seem to be in a creditor's interest to err on the side of making unnecessary disclosures rather than risk the possible consequences of failing to make them.

Compare, Gallegos v. Stokes, 593 F.2d 371 (10th Cir. 1979).

This is precisely the holding of the Court of Appeals. In its business dealings with Mr. Koerner and others, American Express disregarded compliance for its own reasons and at its risk and peril.

The final letter cited by Petitioner, No. 1004, February 10, 1976, 5 CCH Consumer Credit Guide ¶ 31,338 actually discusses the 1974 amendments. Your Honors will note, however,

how none of the elements considered important by Judge Wisdom were present in the question posed to the Federal Reserve Board.

1. The issuer contracted with the company cardholder only (no consumer as "solidary obligor");

2. The cards are used by employees of the company to purchase goods or services required for the performance of their job (no mixed or personal use, but only business use);

3. The cardholder is liable for payment, not the employee (the issuer cannot collect from either the cardholder or the employee, or from the employee at all).

This fact situation totally fails to meet the criterion established by the Fifth Circuit. Therefore, the letter's conclusion, as follows, is totally in accordance with the decision of the Fifth Circuit, to wit:

> It is the opinion of staff, based on the fact situation outlined, that the requirements of Fair Credit Billing do not apply to card issuers in relation to corporate cardholders using the cards for business or commercial purposes.

Petitioner makes the further contention that a proposed revision of Regulation Z, first broached in 1980, and supposedly affirming the foregoing ruling of the Federal Rule Board staff, is entitled to decisive weight. Since this ruling is not contrary to the de-

cision of the Court of Appeals, such an allusion simply begs the question.

In the absence of any contrary administrative interpretation involving the situation in which the issuer attempts to "have its cake and eat it too.", Milhollin is not applicable.

V. THE FIFTH CIRCUIT OPINION IS CONSISTENT WITH THE JUDICIAL RULE OF LIBERAL CONSTRUCTION OF THE TRUTH-IN-LENDING ACT.

United States courts have uniformly held that the provisions of the Truth-in-Lending Act should be construed liberally in favor of the consumer. In 1974, in a case entitled Eby v. Reb Realty, Inc., 495 F.2d 646 (9th Cir. 1974), the Court of Appeals for the Ninth Circuit wrote:

> The Truth in Lending Act is a remedial statute designed as much as possible to permit borrowers to make informed judgments about the use of credit. To effectuate this congressional purpose requires that the Act's terms be liberally construed. See N.C. Freed Co. v. Board of Governors, 473 F.2d 1210, 1214 (2d Cir.), cert. denied 414 U.S. 827, 94 S.Ct. 38 L.Ed. 2d 61 (1973) [sic]; Gardner & North Roofing & Siding Corp. v. Board of Governors, 150 U.S. App. D.C. 329, 464 F.2d 841 (1972).

Id. at 650.

The Fifth Circuit Court of Appeals has also held that the Truth-in-Lending Act should be construed liberally. In Thomas v. Myers-

Dickson Furniture Co., 479 F.2d 740 (5th Cir. 1973), the Court awarded the plaintiff attorney's fees for an action brought under 15 U.S.C. § 1640, as well as for the work which her attorney performed on the appeal. Reconciling the judgment with the provisions of the Truth-in-Lending Act, the Court stated in its conclusion:

> The result we reach today is consistent with the statute's goals of creating a system of "private attorney generals" who will be able to aid the effective enforcement of the Act. Section 1640 is intended to allow aggrieved consumers to participate in policing the Act, . . . and its language should be construed liberally in light of its broadly remedial purpose. The domain of consumer credit with its allied commercial practices is no longer in the laissez faire era of caveat emptor. That doctrine is increasingly relegated to its proper place as a historical relic without modern application. The regulatory scheme forcefully expounds an emerging ethic of "caveat vendor," and we will not strain to avoid giving effect to the Federal Consumer Credit Protection Act.

Id. at 748. The Fifth Circuit reaffirmed its position in Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975), wherein it stated that "we have held that the Truth-in-Lending Act is to be construed liberally in favor of the consumer." Id. at 122.

The same analysis used by the Fifth Cir-

cuit has also been adopted by United States district courts throughout the country. In Allen v. Beneficial Finance Co., 393 F.Supp. 1382 (N.D.Ind. 1975), wherein the district court refused to grant the defendant's motion for summary judgment, the court analyzed the purpose and proper construction of the Truth-in-Lending Act.

> The Truth in Lending Act was designed to provide for mandatory disclosure requirements upon those institutions who extend credit to consumers. The purpose was to assure meaningful disclosure of the cost of credit so that consumers could compare various credit terms and avoid the uninformed use of credit. 15 U.S.C. § 1601. The Truth in Lending Act reflects a transition in Congressional policy from a philosophy of let-the-buyer-beware to one of let-the-seller-disclose. See Mourning v. Family Publication Service, Inc., 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). . . . To effectuate this congressional purpose requires that the act's terms be liberally construed. Eby v. Reb Realty, Inc., 495 F.2d 646 (9th Cir. 1974)] at 650; Scott v. Liberty Finance Co., 380 F.Supp. 475 (D.C.Neb. 1974); Philbeck v. Timmers Chevrolet, Inc., 499 F.2d 971 (5th Cir. 1974); Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975).

Id. at 1384.

Similarly, state courts have adopted a rule of construction favorable to consumers. One of the most articulate statements was made by the Court of Civil Appeals of Alabama in

Irvin v. Public Finance Co. of America, 340 So.2d 811 (Ala.Civ.App. 1976), cert. denied 340 So.2d 815.

> Courts have taken to heart the purpose of the Act, stating both that it is to be liberally construed in favor of the consumer, Hannon v. Security Nat. Bank, 537 F.2d 327 (9th Cir. 1976); Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975); Gerasta v. Hibernia Nat. Bank, 411 F.Supp. 176 (E.D.La. 1975); Allen v. Beneficial Finance Co., 393 F.Supp. 1382 (N.D.Ind. 1975), and also that it is to be strictly enforced. Redhouse v. Quality Ford Sales, Inc. 511 F.2d 230 (10th Cir. 1975); Powers v. Sims and Levin Realtors, 396 F.Supp. 12 (E.D.Va. 1975).
>
> In a similar vein, numerous instances exist where the court, though stating that the violation is somewhat technical in nature, declares that the lender has not complied with the strict terms of the Act and is therefore liable for the penalty provided therein. Pennino v. Morris Kershman & Co., 526 F.2d 367 (5th Cir. 1976); Powers, supra. In short, the Act "reflects a transaction [sic] in Congressional policy from a philosophy of 'let-the-buyer-beware' to one of 'let-the-seller-disclose.'" Allen, supra, at 1384.

Id. at 813.

Many more courts, at all judicial levels, have also adopted the liberal rule of construction for application of the provisions of the Truth-in-Lending Act. The Fifth Circuit decision in the instant case, therefore, is

consistent with the uniform adoption of the rule of liberal construction.

If the use of the Respondent's credit card had been restricted solely to business use, Petitioner might at least be able to argue that the business exemption could apply. On the other hand, if the Respondent had used the card solely for personal use, there would be no question as to the application of the Fair Credit Billing Act. The issue of classification arises when the use of the card is mixed, being partially used for personal purposes and partially used for business purposes. In the absence of a workable test for determining the "predominant use," and in view of the rule of liberal construction of the Act in favor of consumers, the Fifth Circuit's inclusion of Respondent in the class of consumers protected by the Act is well-considered and sound. To do otherwise would undermine the purpose on Congress in enacting the Truth-in-Lending Act.

VI. A "PROSPECTIVE PREDOMINANT USE" TEST WOULD BE UNWIELDY IN ITS APPLICATION, ACCORDINGLY THE BUSINESS EXEMPTION SHOULD NOT BE APPLICABLE TO EXEMPT PETITIONER IN THIS CASE FROM COMPLIANCE WITH 15 U.S.C. § 1666

There are three additional alternative bases for affirmance of the decision of the Court of Appeals under the facts of this case, to wit:

1. 15 U.S.C. § 1666 should be applied to all business and commercial transactions because of the lack of an extension of credit in revocation situations and on account of the lack of any test to determine whether or not there is any "predominant use" of the credit card.

2. 15 U.S.C. § 1666 should be applied to Respondent because the Truth-in-lending laws were not in effect at the time of the Application, and any retroactive determination of prospective "predominant use" to the time of the Petitioner's Application would be a fiction at best.

3. 15 U.S.C. § 1666 should be applied to Respondent because the American Express Company made no attempt to ascertain whether or not the usage of the card was for any purpose other than for personal use, accepted personal funds from Respondent, and took no steps to restrict the use of the card to business purposes.

1.

General Applicability of 15 USC § 1666

Although the Court of Appeals did not decide whether the business exemption should be applied to the 1974 amendments dealing with credit cards, terming the issue "obviously difficult" (Pet. App. 9a), both judicial and administrative interpretations, as well as the legislative history, of these amendments lead to the conclusion that the exemption for

business and commercial transactions allowed under 15 U.S.C. § 1603 should not apply to the 1974 amendments.

When Congress enacted the Truth in Lending Act in 1968, the original Act contained no provisions regarding credit card transactions, but was intended to provide "a meaningful disclosure of credit terms" to consumers. 15 U.S.C. § 1601. As the Act was a piece of consumer protection legislation focused on consumer credit transactions, exemptions were allowed for corporate debtors and individuals who secure credit for business or commercial purposes. These debtors were thought to be amply sophisticated to make informed judgments as to the value of alternative credit plans and to be able to negotiate beneficial credit terms, so as not to require the special disclosure protections provided by the Act. Hence, 15 U.S.C. § 1603 exempted "credit transactions involving extentions of credit for business or commercial purposes or . . . to organizations [defined to include corporations and partnerships]."

As discussed supra, the business or commercial purpose exemptions remain in full force with regard to the provisions of the 1968 Truth in Lending Act itself, and it has never been that application of these exemp-

tions which is at issue in the present case.

The 1970 and 1974 amendments to the Truth in Lending Act, which deal with credit card transactions, present a much more problematic situation when an attempt is made to reconcile them with the business and commercial exemptions of 15 U.S.C. § 1603. Judicial and administrative interpretations of the 1970 amendments, which sought to prevent the issuance of unsolicited credit cards, 15 U.S.C. § 1642, to limit to $50.00 the liability for the unauthorized use of a credit card, 15 U.S.C. § 1643, and to provide criminal sanctions for the fraudulent use of a credit card, 15 U.S.C. § 1644, concluded that the business and commercial exemptions provided by 15 U.S.C. § 1603 were inapplicable to the amendments. See, American Airlines, Inc. v. Remis Industries, Inc., 494 F.2d 196 (2d Cir. 1974), Federal Reserve Board regulation 12 C.F.R. 226.13(a)(4), (1973)(amended Nov. 2, 1972) now codified at 226.2(m), and a Federal Trade Commission decision, In re Credit Card Service Corp. d/b/a Credit Card Service Bureau, 82 F.T.C. 191, 209-11 (1973), affirmed and enforced sub nom. Credit Card Service Corp. v. Federal Trade Commission, 495 F.2d 1004 (D.C. Cir. 1974). These interpretations by Courts of Appeals, as well as by the Federal Reserve

Board and the Federal Trade Commission, construed the credit card amendments to the Truth in Lending Act as applicable to all credit cardholders, including corporations.

The conflict between the business exemptions of 15 U.S.C. § 1603 and the 1970 credit card amendments arises for two reasons. First, unlike other forms of credit transactions in which the potential corporate debtor, being in a better bargaining position than its consumer counterpart, may negotiate better credit terms, there is no distinction between the corporate and the consumer credit cardholder when faced with a standardized credit card application form. The use of form contracts for credit card applications, the Remis Court stated, makes the process "a take-it-or-leave-it method of contract formulation." 494 F.2d at 202. Secondly, there is no viable way of distinguishing between credit cards issued for "business purposes" and those issued for "personal use," since a credit card is often used for both personal and business transactions.

Petitioner argues that these cases have no application to this case, since they dealt with the 1970 amendments to the Truth-in-Lending Act, and not with the 1974 amendments. [Brief for Petitioner 24.]

Contrary to Petitioner's assertion, however, both the reasoning of these two cases and the analogous factual circumstances addressed by these cases are very much apposite to the case at bar.

Speaking of the application of the business or commercial exemption to the credit card amendment there at issue, the Remis Court wrote that such an application

> would raise a threshold question for which the Act at least provides no ready answer: at what point in the credit card process does the transaction involving the extension of credit occur? Since the likely response is at the time the credit card is issued, confusion would prevail over the classification of cards issued to natural persons. Were the cards issued for business or commercial use and thus excluded from protection, or were they for personal use and hence covered under [the amendment]?

494 F.2d at 201. The Remis Court considered a predominant use test as a possible solution, but concluded that "the extensive, overlapping use of some types of credit cards, e.g. to purchase gasoline or meals in a restaurant, would make this test wholly unwieldy in application" and would produce "needless uncertainty." Id. Furthermore, the Court reasoned that the application of the exemption to the credit card provisions "would replace the uni-

form safeguards demanded by the nature of the problem which Congress addressed with a crazy-quilt design of cardholder protection." Id. Clearly the needless uncertainty and unwieldy application of any "predominant use" test would be equally present if used in connection with the 1974 amendments as the Court thought it would be in the context of the 1970 amendments.

The Fifth Circuit discussed Remis in the context of the other possibility, to wit: a transaction involving the extension of credit occurs when the card is used. The Remis court concluded that the unauthorized use of a card is not an extension of credit to the cardholder. Id. at 201 n. 4. Whether the unauthorized user had a business or personal purpose should not determine whether $50 limits the cardholder's liability. For the same reason, the unauthorized revocation of a card at New Orleans International Airport was not an extension of credit. The nature of the transaction in which the unlawful revocation takes place can not determine whether or not the exemption applies.

The problem of identifying and categorizing the "credit transaction" for the purposes of exempting certain classes of credit cards was also discussed in Credit Card Service

Corp. v. Federal Trade Commission, supra. Again, although the case involved the 1970 amendments, the rationale used by the Court in rejecting a "predominant use" test is equally applicable to the 1974 amendments and the instant case. The Court wrote:

> Petitioner never explains why [15 U.S.C. §] 1603(1), which exempts certain "credit transactions" should apply to a particular class of credit cards. Of course, when an individual uses his card for business, that is a "credit transaction for business . . . purposes." But in such a case, the liability limitation does not come into play because there has been no unauthorized use. If, nonetheless, we assume that using a card for business purposes exempts an individual from the liability limitation, how long does that exemption last? Until the next time the card is used for a non-business purpose? Under this approach, liability would depend on how a card was last used before it was lost or stolen.

495 F.2d at 1007. Applying the Court's analysis to American Express' argument in the case at bar, a classification of the Respondent's card would depend upon how the card was last used before it was revoked. Such a method of classification is clearly untenable. The Court continued:

> Petitioner, of course, seeks to avoid this result. Its position seems to be that when a card is issued or used primarily for business, the card itself becomes "a credit transaction . . . for

> business . . . purposes." Thus the card is exempted from the statute by [15 U.S.C. §] 1603(1) even on those occasions when it is not used for business. We are unwilling to assume that a credit card can be transformed into a credit transaction in this fashion. [Emphasis in the original] [Footnotes omitted].

Id. at 1007-08.

The D.C. Circuit Court of Appeals continued its analysis in the following footnote:

> Nor can the transformation be achieved by arguing that when a card is issued for business, that is a "credit transaction involving the extension of credit for business. . . ." Credit is extended when a card is used, not when it is issued. . . ."

Id. at 1008 n. 21. The Court concluded that a "prospective predominant use" test, such as Petitioner in the instant case advocates, would "create practical difficulties." Said the Court:

> A credit card is often used for both business and personal transactions. Considerable litigation and uncertainty would result if courts had to determine if a card was issued "primarily" for business.

Id. at 1008.

As indicated by the excerpts quoted above, the Courts are in disagreement as to when the "credit transaction" in the credit card process actually occurs. While the Second Cir-

cuit Court of Appeals, in Remis, stated that the "likely response is at the time the credit card is issued," 494 F.2d at 201, the D.C. Circuit, contrary to the position of Petitioner [Brief for Petitioner 29], flatly refused to consider the issuance of the card as being the "credit transaction," stating that "[c]redit is extended when a card is used, not when it is issued." 495 F.2d at 1008 n. 21. Both courts concluded that applying the business exemptions to credit cards was improper or illogical. These courts reasoned that the only place where there might have been an extension of credit was at the time of the unathorized use. Similarly, there is no extension of credit at the time that the revocation takes place, and it would be equally improper and illogical to apply the business exemption, which applies to "extensions of credit" to an unlawful revocation.

Petitioner would argue that if the card is used for business or commercial purposes, then the amendments do not apply by application of 15 U.S.C. § 1603. The problem crystallizes particularly in the instances wherein the uses of the card are mixed, that is, when the card is used for both personal and business purposes.

The Act gives no clear answer as to how

such cards are to be categorized. Furthermore, the jurisprudence has clearly indicated the unwieldy and unworkable nature of a "primary use" or "prospective predominant use" test. As the Court in Credit Card Service Corp., supra, observed, much litigation and uncertainty would result if the courts had to make a determination in each case as to the "primary use" of the card.

The District Court in the instant case, contrary to the reasoning of the courts in Remis and in Credit Card Service Corp., fashioned its own prospective predominant use test. It based its judgment on its assumption that when an individual gets a credit card through his employer, the predominant use of that card will be for business purposes, whereas when an individual applies for a card on his own, the primary use of that card will be personal. Such an assumption is not only weak, but would also easily evaded. Large corporations with many traveling employees would merely have these individual employees acquire credit cards in their own names, then make contractual arrangements to reimburse employees for all business uses of the card (i.e. expense account reimbursement). In this manner all uses of the card would be brought within the coverage of the Truth in Lending

Act, even though the predominant use of the card was for business purposes. Conversely, the small businessman with no, or few, employees, who might acquire a credit card in his company name for reasons of convenience and economy, would not be protected by the provisions of the Truth in Lending Act, even though it is possible that the predominant use of the card would be for personal purposes. To allow such an unworkable test to govern the application of the 1974 Truth in Lending Act provisions on credit card transactions would be to frustrate the very purpose of the amendments -- the prevention of "high-handed tactics of card issuers in their handling of complaints [by consumers]." 444 F.Supp. at 341.

With regard to credit cards, the only courts to have considered the issue, supra, have uniformly held that any "purpose of use" or "predominant use" test for classifying a particular credit card as either business or personal is unwieldy and totally unworkable. The Courts have thus held that the amendments to the Truth in Lending Act which deal with credit card transactions were intended to apply to all credit card transactions, including business and commercial transactions.

2.

Inability to Use a Retroactive Determination

15 U.S.C. § 1666 should be applied to Respondent because the Truth-in-lending laws were not in effect at the time of the Koerner Application. In the absence, at the time of the application, of any distinction in the mutual performance of the parties involving business and personal use, the "predominant use test" or any variant would therefore have to fictionalize the intent of the parties.

Any retroactive determination of "predominant use" to the time in 1965 of the Application would be at best a guess and would clearly be an unfair, inappropriate, and legally unjustified post hoc method of arriving at a result.

3.

Lack of Subsequent Action by American Express

15 U.S.C. § 1666 should be applied to Respondent because the American Express Company made no attempt to ascertain whether or not the uses of its card issued to Mr. Koerner were for any purposes other than for personal uses, accepted personal funds from Respondent as late as September 2, 1976, and took no steps to restrict the use of the card to business purposes.

American Express earns money from the use of the credit cards that it issues. It earns

money for each transaction, and there is great rivalry among credit card issuers for volume of sales and substantial advertisement and encouragement of use to achieve such volume.

If a card were restricted to business uses or only the company cardholder was the obligor, this would mean a lesser volume of transactions resuling in the loss of earnings otherwise generated by transactions involving personal uses and the loss of transaction volume to consumer or unrestricted credit cards. The existence or non-existence of personal liability, of the protections of the Fair Credit Billing Act, and of meaningful disclosure of these factors may also become matters of competition between card issuers as to which issuer would provide a company card which could be used with all types of transactions rather than one restricted only to business or commercial transactions. See Credit Card Service Corp. v. Federal Trade Commission, supra. Such disclosure and competition would enable a cardholder "to compare more readily the various credit terms available to him and avoid the uninformed use of credit." [15 U.S.C. § 1601]

As can be seen from the prior discussion of the adminstrative letters, American Express was on notice that it should either comply

with the law, make disclosures, or ascertain for certain whether or not, in dealing with potential consumers, any credit transaction or series of transactions were indeed business or personal. Although it had notice of the risk, Petitioner choose not to comply with the law. Its actions were prompted by its own corporate purposes of maximization of earnings and of maintenance of competitive equality with card issuers who do comply with the law or who do not hold consumers liable on business cards. American Express should not now be able to claim that its choice and its result has distorted the fabric of commercial transactions.

While the Court of Appeals may not have wished to resolve the issue of whether corporate transactions and transactions for business or commercial purposes are protected by the 1974 amendments dealing with credit cards, a decision by this Court protecting individuals from unauthorized revocation of their credit cards is an appropriate solution in light of the difficulty of classifying credit cards as to their "predominant use" and on account of the absence of an extension of credit in card revocation situations. It is the individual consumer who is subjected to the harrassment and embarrassment which the amendments are designed to prevent.

The most clear-cut method of protecting the individual from such harrassment, in the absence of any viable test for classifying credit cards, is to apply the protections of 15 U.S.C. § 1666 to all cards.

It would seem as Petitioner should welcome such a test, as it eliminates the prospective uncertainty on the part of the credit card issuer as whether or not to comply in a particular case with 15 U.S.C. § 1666. See Public Information Letter of Jeraud C. Kluchman, dated July 18, 1974, No. 821, 5 CCH Consumer Credit Guide ¶ 31,338, discussed supra. The predominant use test invites violation, since the facts of predominant use by the cardholder would seldom if ever be within the knowledge of the issuer in the absence of a contractual provision.

VII. THE IMPACT ON CREDIT FOR BUSINESS ENTERPRISES WILL BE, AT MOST, MINIMAL AS A RESULT OF THE COURT OF APPEALS' DECISION

Finally, the American Express Company claims and would have the Court believe that the decision of the Court of Appeals will have a significant impact on credit for business enterprises. This is simply not the case. As indicated above, the holding of the Fifth Circuit is a very narrow one, limited only to the 1974 amendment to the Truth-in-Lending Act.

Thus, the effect on the majority of commercial credit transactions, such as loans to corporations, is non-existent, regardless of the practice of many lending institutions to require individual liability as security. These forms of credit transactions, easily prospectively classified as business or commercial in nature, remain untouched by the holding in the case at bar and are still exempted by 15 U.S.C. § 1603.

The sole credit transaction affected by the decision of the Court of Appeals is the credit card transaction in which an individual cardholder is signed as principally liable for personal and business debts incurred on the card. Henceforth it will be necessary for the credit card issuer to abide by the requirements of 15 U.S.C. § 1666 in correcting billing errors or settling billing disputes. The mechanisms for complying with the provisions of 15 U.S.C. § 1666 are already established for the millions of other consumer cardholders. The additional "burden" of providing notice of a problem, of providing an opportunity to explain billing and payment discrepancies, and of providing an opportunity to contest the revocation of a credit card, will be, at most, minimal. Complying with these provisions will mean that credit card issuers

will merely have to take the time to enclose some form of notice with the monthly bill and will have to listen to the explanation of a cardholder who has a discrepancy in his account statement. Certainly, such compliance is consonant with the purpose of the amendment -- to prevent the harrassment of consumers by creditors.

Alternatively, credit card issuers could restrict the use of certain credit cards solely to business use and delete consumer liability. E.g. Public Information Letter No. 1004, supra. Such a restriction should not work a hardship upon the credit card issuer, nor is such a restriction unusual.

Many lending institutions restrict the use of certain loans to business purposes and/or require a prior specific statement by the debtor stating that the credit extension is for business purposes. See e.g. Affidavit of Business Loan of Dauphin Deposit Bank & Trust of Harrisburg, a copy of which is annexed hereto as Exhibit A. Additional inquiry indicates that Hamilton Bank of Harrisburg, Pennsylvania, Broad Street National Bank of Trenton, New Jersey, and Colonial Bank of New Orleans, Louisiana also adhere to this obviously prudent commercial policy. By restricting the use of certain credit cards in

this same way, making disclosures and business/personal determinations in advance, the extension of credit by credit card issuers upon these cards could be easily categorized as for a business or commercial purpose, and thereby be exempted from the provisions of 15 U.S.C. § 1666, if this Court felt that the exemption should be applied.

In fact, a solution involving a restriction of this nature would clearly be in consonance with the administrative interpretations cited by Petitioner. Holders of credit cards restricted solely to business use would accordingly not be protected under the Fair Credit Billing Act. However, those cardholders whose cards are unrestricted and can be and/or are used for mixed purposes would still be granted protection against those practices against which the 1974 amendments were enacted. This is the very solution that American Express appears to suggest this as an alternative [Brief for Petitioner 29], but, of course, Petitioner would leave the post-violation determination solely to the issuer without notice to the cardholder, while the solution of a prior specific statement would require that the nature of the account and the consequences, if any, of a restriction to business use, be clearly spelled out.

Mechanically this should be no problem for the future, inasmuch as it is not unusual for issuers to change terms of credit cards issued by them, including the providing in such notice of the option of cancellation and return of the card. There are established credit and banking procedures and forms for such things as an increase in percentage of monthly finance charges and the imposition of a yearly card fee where none before existed.

In the same way, a business restriction on certain cards should not pose any serious burden upon the credit card issuers. The card applications and renewal forms would merely ask an applicant to specify the type of card for which he was applying and provide information as to the consequences of the choice on individual liability as a principal and on the applicability, vel non, of the Fair Credit Billing Act. Surely the certainty provided by card classification before issuance, clearly stated to the applicant, is preferable to the guesswork inherent in any "predominant use" test at the time of a problem or dispute. Additionally, judicial resources could be conserved by application of a clear rule instead of the unwieldy predominant use test, since the latter would often require judicial fact-finding to determine the actual predomi-

nant use of the card. A balancing of social costs and benefits clearly shows substantial benefit to be gained by the implimentation of such a rule at minimal cost to the credit card issuer.

CONCLUSION

The decision from which Petitioner appeals is one narrow in its scope. It does not limit the applicability of the business or commercial transactions exemption to the broad range of ordinary commercial credit transactions, but merely attempts to achieve the purpose of the 1974 Fair Credit Billing Act -- to prevent the harassment of consumers by creditors. The decision classifies natural persons who are liable as principals for both personal and business debts on their credit cards as consumers and thereby accords them the protections provided by the Act.

The facts of the present case argue strongly for the application of the 1974 amendments to the credit card in question. There was never any prior notification to John E. Koerner & Company or to Louis R. Koerner, Sr. from the American Express Company that the billing error was the cause of any problem, nor that the American Express Company was even considering the revocation of the card. The card was revoked unilaterally, without notice,

without an opportunity to explain, and without opportunity to contest. The unfairness and the embarrassment were maximized. Surely this is exactly the type of action which the provisions of 15 U.S.C. § 1666 were intended to correct.

The alternative to such a holding would require a test for determining the classification of credit cards according to their "prospective predominant" or "predominant" use. Such tests have been shown to be unwieldy and unworkable, creating needless uncertainty and considerable litigation. In addition, such tests are easily evaded by sophisticated businessmen, while laying a trap for the less sophisticated.

In the absence of a workable test for classifying credit cards as to their primary use, the decision provides a simple and straightforward test, which is non-technical and easily understood, and which can be applied in all situations with a minimum amount of difficulty. Credit card issuers, such as the American Express Company, which wish to retain the benefits of any business or commercial transactions exemption of 15 U.S.C. § 1603 could eliminate primary liability of the consumer, restrict the use of certain credit cards solely to use for business or commercial

purposes, and/or require a statement from the cardholder as to card use, a practice used in commercial loans to individuals.

Alternatively, this Court could hold very simply that the 1974 Amendments, as did the 1970 Amendments, apply either to all cards or to those portions of the Fair Credit Billing Act, as amended, that do not involve "credit transaction involving extensions of credit," such as that governing the correction of billing errors and card revocations, 15 U.S.C. § 1666.

For these reasons, Respondent respectfully prays that the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit in the instant case be affirmed.

Respectfully submitted,

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By:_____

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CERTIFICATE

I hereby certify that a copy of the foregoing pleading has been served upon all interested counsel, by placing a copy of the same in the United States Mail, postage pre-

paid and properly addressed, all on this _____ day of March, 1981.

_____

Louis R. Koerner, Jr.

AFFIDAVIT OF BUSINESS LOAN

COMMONWEALTH OF PENNSYLVANIA)
) SS.
COUNTY OF)

_____, being duly sworn according to law, deposes and says that he is the _____
owner, proprietor, general partner

of _____,
Name of Business

that he is authorized to make this affidavit on its behalf; and that the loan or extension of credit from Dauphin Deposit Bank and Trust Company as evidenced by an instrument dated _____, 19 ____ is for the business purpose of _____.

_____

Sworn to and Subscribed before me
this _____ day of
_____, 19 _____.

_____
Notary Public

My Commission Expires:

L-85 (3-75 - Name Revision 9-78)

No. 80-202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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April 10, 1981

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IN THE

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OCTOBER TERM, 1980

No. 80-202

AMERICAN EXPRESS COMPANY,
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v.

LOUIS R. KOERNER, SR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

I. THE BUSINESS PURPOSE EXEMPTION IS NOT LIMITED, AS RESPONDENT CONTENDS, TO CREDIT ACCOUNTS THAT ARE CONTRACTUALLY RESTRICTED TO BUSINESS USE.

Respondent argues that individuals who are jointly liable for debts incurred on a company credit card account should be treated as "consumers" whenever there is *any* personal use of the account whatsoever. Resp. Br. at 7, 20-24. He therefore concludes that the business purpose exemption contained in § 104(1) of the Act is inapplicable in this case. He further contends that the business purpose exemption should be available only for those accounts—unlike the Koerner company account—that contain a contractual restriction limiting their use exclusively to business purposes. *Id.* at 8, 24. The language of the statute, the legislative history, prior court

decisions, and the rulings of the Federal Reserve Board offer no support for any of these arguments.[1]

The language of the Act is dispositive. The term "consumer," as defined in § 103(h) of the Act, refers only to those transactions in which

> the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are *primarily* for personal, family, household, or agricultural purposes.

15 U.S.C. § 1602(h) (1976) (emphasis added).[2] The use of the word "primarily" in the definition anticipates that credit will often be extended for mixed purposes and requires that such mixed transactions be classified according to their predominant purpose. Only if the transaction has a predominantly consumer purpose can it be treated as a consumer credit transaction covered by the Act.

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[1] To the extent that Respondent is arguing that all individuals jointly liable for credit card debts are "consumers" protected by Truth-in-Lending, he has totally ignored the showing in our main brief (Pet. Br. at 8-18) that Congress intended the business purpose exemption to extend to all types of obligors—individuals and proprietorships as well as partnerships and corporations—as long as the credit was being obtained for business or commercial purposes.

Nor can the Fifth Circuit's decision be saved by trying to limit the holding, as Respondent suggests (Resp. Br. at 2), to the Fair Credit Billing Act. The Fifth Circuit itself purported *not* to be interpreting § 161, 15 U.S.C. § 1666 (1976), and the explicit language of that section indicates clearly that it was designed to cover only open end consumer credit plans and was thus intended to be subject to the business credit exemption. *See* Pet. Br. at 19.

[2] Likewise, Regulation Z defines consumer credit to mean

> credit offered or extended to a natural person, in which the money, property or service which is the subject of the transaction is *primarily* for personal, family, household or agricultural purposes.

12 C.F.R. § 226.2(p) (1980) (emphasis added). *See also* 46 Fed. Reg. 20848, 20893 (April 7, 1981) (new Regulation Z definition of "consumer credit" contained in revised § 226.2(a)(12)).

Section 104(1), 15 U.S.C. § 1603(1) (1976), the business purpose exemption, reflects the other side of the coin. Although the word "primarily" appears only in § 103(h), the courts have uniformly read a similar concept into the "business purpose" language of § 104(1). *See Redhouse* v. *Quality Ford Sales, Inc.*, 511 F.2d 230, 235 (10th Cir. 1975); *Brill* v. *Newport National Bank*, Consumer Credit Guide (CCH) ¶ 99,057 (S.D.N.Y. 1973); *Smith* v. *Chapman*, 436 F. Supp. 58, 61 (W.D. Tex. 1977), *aff'd*, 614 F.2d 968 (5th Cir. 1980).[3] As Senator Proxmire stated in congressional debate prior to passage of the original Act, the bill "would not cover . . . credit extended *primarily* for business or commercial purposes." 113 Cong. Rec. 18401 (1967) (emphasis added).

Respondent tries to avoid the clear statutory language against his position by arguing that a "primary purpose" test cannot sensibly be applied to credit cards that are usable for multiple purposes. Besides having no basis in the language or legislative history of the Act, this argument misses the point. Section 104(1) exempts

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[3] *Redhouse* v. *Quality Ford Sales, Inc.*, 511 F.2d 230 (10th Cir. 1975), concerned a credit transaction involving the purchase of a pickup truck for mixed personal and business purposes. The court held that the business and personal uses of the truck must be weighed to determine which use was predominant. The court stated that such a credit transaction would be exempt from the Act "whenever the vehicle usage is 'predominantly' commercial and it need not be 'entirely' commercial." *Id.* at 235.

In *Brill* v. *Newport National Bank*, Consumer Credit Guide (CCH) ¶ 99,057 (S.D.N.Y. 1973), plaintiffs had purchased an apartment building in Newport, Rhode Island, consisting of five units, and had mortgaged the property to the defendant. Plaintiffs used one unit as a summer vacation home but rented it out during the remainder of the year. Three units were held out for rent year round, while the remaining unit was available to a single individual in return for caretaker services. Comparing the number of units available for rent with those reserved for plaintiffs' own personal use, the court held that the building was primarily a business venture and that the financing was therefore exempt from the Truth-in-Lending Act. *Id.* at 88,858.

"*transactions involving* extensions of credit for business or commercial purposes." (Emphasis added.) This language presupposes that one transaction can involve multiple extensions of credit, and it requires that the exemption be applied to the transaction as a whole, not to the underlying extensions of credit. Indeed, the section of the Act that American Express supposedly violated in this case—§ 161(d), 15 U.S.C. § 1666(d) (1976)—covers only an "open end consumer credit plan" which, by its nature, involves multiple extensions of credit under a single plan.

For such plans, the "transaction" exempted by § 104(1) is the plan as a whole, and the purpose of the transaction must be determined by looking to the purpose of the parties in entering into the transaction. Since the Koerner company, Mr. Koerner personally, and American Express all agreed to the opening of a "company account" (J.A. at 27a-28a),[4] the District Court was justified in holding that the parties had entered into a credit transaction that was primarily for business or commercial purposes and was thus exempted by § 104(1). Whether or not the Koerner company chose to permit Mr. Koerner to use the company card to make some personal purchases, that action cannot override the initial agreement of all the parties that they were engaging in a business transaction.

As our main brief makes clear, this reading of the statute is both compelled by its language and sensible in practice. Card issuers must determine, for each account, whether or not compliance with the complicated procedures mandated by Truth-in-Lending is required. Section 127(a), 15 U.S.C. § 1637(a) (1976), requires making initial disclosures for non-exempted accounts; § 127(b), 15 U.S.C. § 1637(b) (1976), requires sending periodic statements; and § 161, 15 U.S.C. 1666 (1976), establishes

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[4] Respondent has conceded that all of the billing to the Koerner Company was done "as a business account." J.A. at 25a, 30a.

detailed procedures for resolving billing error inquiries. Each set of requirements must apply to an entire account or must be entirely inapplicable. A rule requiring different results for each charge ticket, depending on the precise facts relating to the cardholder's motivation for using his card to charge the merchandise in question, would make no sense at all. Since Congress made it clear that the business purpose exemption was to be applicable to the billing error provisions added to the Act in 1974, and since these provisions apply to credit card accounts (*see* Pet. Br. at 20), Congress must have intended that establishment of a business credit card account could be a "transaction involving extensions of credit" exempted by § 104(1).[5]

Respondent cannot avoid the effect of the exemption by arguing that it should not apply because he was jointly liable, as an individual, on the business account. Respondent's lengthy recitations of Louisiana law on this point are totally irrelevant. *See* Resp. Br. at 10-17. As we have shown in our main brief, the crucial question under the Act is not *who* is liable but what the *purpose* of the transaction is. *See* Pet. Br. at 8-18. Here, Respondent was not opening a personal card account for his personal use, as he was perfectly free to do (assuming that he qualified for a personal card). He was asking, in conjunction with the Koerner company, that a company card obtained for a business purpose be issued to him. That was an exempted transaction under § 104(1) whether Respondent was liable as a surety, as a co-obligor, or even as a sole obligor.[6]

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[5] As defined in the Act, credit includes not only the right to defer payment on a particular debt, but also the right to incur debts and defer payment of them. § 103(e), 15 U.S.C. § 1602(e) (1976); 12 C.F.R. § 226.2(q) (1980). Therefore, a credit card account—representing the "right to incur debt and defer its payment"—constitutes "credit" for purposes of the Truth-in-Lending Act, and the opening of the account involves a credit transaction. § 226.2(u) (1980), makes it entirely irrelevant whether Respondent was a surety or a co-obligor. Under the explicit language con-

[6] An existing provision of the old Regulation Z, 12 C.F.R.

II. THE FEDERAL RESERVE BOARD HAS UNAMBIGUOUSLY REJECTED RESPONDENT'S POSITION.

Respondent's arguments relating to the Federal Reserve Board's administrative construction of the Act (Resp. Br. at 24-33) are both confusing and confused. In addition, a recent development—the Board's issuance of an entirely revised Regulation Z on March 26, 1981—renders most of Respondent's contentions irrelevant. A few words are therefore necessary to set the record straight.

In Public Information Letter No. 727, issued in late 1973 (Pet. App. at 3g), the Federal Reserve Board staff analyzed the applicability of the Truth-in-Lending Act in a situation identical to the one involved here. A corporation and a corporate employee were jointly and severally liable for obligations incurred on the employee's company credit card. In answer to a question relating to the applicability of the business credit exemption to such a card system, the staff stated that

> [i]f the credit is for business or commercial purposes, it would not be subject to Truth in Lending by virtue of the exemption in § 226.3(a).

Respondent attempts to distinguish this holding by noting that this letter dealt specifically with the disclosure sections of the Act, not the billing error provisions. But this distinction has force only if the business credit exemption applies only to the disclosure provisions, and not to the billing error provisions. The Board has rejected that contention. Public Information Letter No. 1004, issued in 1976 (Pet. App. at 7g), holds specifically that the business purpose exemption does apply to Fair

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tained in the definition of "customer," a term that triggers the substantive sections of the Regulation, comakers, endorsers, guarantors, and sureties are either equally covered—or equally not covered—by the Regulation.

Credit Billing.[7] Accordingly, the rulings in letters 727 and 1004, taken together, are dispositive.

Respondent suggests, however, that Public Information Letter No. 727 provides support for his contention that the business purpose exemption will not apply where a credit card is used for both business and consumer purposes. Respondent is mistaken. The letter in fact states:

> [I]f the purpose of the credit is mixed but *primarily* for personal, family, household or agricultural purposes, the credit would be subject to Truth in Lending's provisions. *However, we suspect that few cards, if any, which are issued with a corporation as a cardholder would fall within this category.*

Pet. App. at 3g-4g (emphasis added). This ruling adopts a "primary purpose" test for credit cards fully consistent with the holding of the District Court in this case.[8] We submit that the Fifth Circuit erred in overturning that decision.

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[7] Respondent attempts to minimize the significance of Public Information Letter No. 1004 by arguing that the facts stated in that letter are not identical to the facts of this case. But the card system involved there does not appear to be any different from the card system involved here. Although Letter No. 1004 does not specifically state that individual employees were jointly liable under the system involved there, it does not say that they were not liable either; the fact that bills were sent only to the company is not dispositive of the liability point since Respondent Koerner did not receive bills either. J.A. at 25a, 30a. The letter is simply silent on the liability issue. The critical point, however, is that the letter does find the business purpose exemption applicable to the Fair Credit Billing provisions. This is the one issue in this case not addressed by Public Information Letter No. 727.

[8] Respondent relies on Public Information Letter No. 821 to argue that where credit extended to a natural person may be for both consumer and business purposes, the business purpose exemption will not apply. But that letter does not support Respondent. The letter indicates only that where there is uncertainty as to the purpose for which credit was obtained, the creditor may find it *prudent* to comply with Truth-in-Lending requirements. The letter does not rule as a matter of law that the business purpose exemption cannot apply where mixed purposes may be involved.

Finally, it should be noted that the Federal Reserve Board has recently reaffirmed the position it took in the letters discussed above when it issued a completely revised Regulation Z, which took effect on April 1, 1981.[9] 46 Fed. Reg. 20848 (April 7, 1981). The revised Regulation rewrites the language creating the business purpose exemption:

> This regulation does not apply to the following:
>
> (a) *Business, commercial, agricultural, or organizational credit.** (1) An extension of credit primarily for a business, commercial or agricultural purpose.
>
> (2) An extension of credit to other than a natural person, including credit to government agencies or instrumentalities.

* Extensions of credit that are exempt under paragraph (a) (1) and (2) remain subject to § 226.12(a) and (b) governing the issuance of credit cards and the liability for their unauthorized use.

§ 226.3, 46 Fed. Reg. 20894 (April 7, 1981). Under this unambiguous language, the business purpose exemption will apply whenever credit is extended *primarily* for business or commercial purposes. Respondent's argument that an exclusive business purpose is required has thus been flatly rejected. The new Regulation also states that the exemption applies to all provisions of the Regulation other than those which are specifically excepted. Because the Fair Credit Billing provisions are not among the excepted sections, they are fully subject to the exemption.

The new formulation of the Fair Credit Billing provisions in the revised Regulation Z takes the same approach. These provisions have been rewritten so that

[9] Creditors have the option of complying with the old Regulation Z until March 31, 1982. Beginning April 1, 1982, creditors subject to Regulation Z must comply with the revised Regulation. 46 Fed. Reg. 20848 (April 7, 1981).

they apply only to "consumers." § 226.13, 46 Fed. Reg. 20899 (April 7, 1981). A "consumer" is defined to mean "a cardholder or a natural person to whom consumer credit is offered or extended." § 226.2(a)(11), 46 Fed. Reg. 20893 (April 7, 1981). A "cardholder" is in turn defined to mean

> a natural person to whom a credit card is issued for consumer credit purposes, or a natural person who has agreed with the card issuer to pay consumer credit obligations arising from the issuance of a credit card to another natural person. For purposes of § 226.12(a) and (b), the term includes any person to whom a credit card is issued for any purpose, including business, commercial, or agricultural use, or a person who has agreed with the card issuer to pay obligations arising from the issuance of such credit card to another person.

§ 226.2(a)(8), 46 Fed. Reg. 20893 (April 7, 1981). Because the Fair Credit Billing provisions are not among the excepted provisions, only natural persons who are liable for credit cards issued for *consumer credit* purposes, defined to mean "credit offered or extended to a consumer primarily for personal, family or household purposes," § 226.2(a)(12), 46 Fed. Reg. 20893 (April 7, 1981), can gain their benefit. As the Board's commentary states, "cards issued for non-consumer credit purposes are covered only by the provisions regarding credit card issuance and liability." [10] This result is identical to that reflected in Letters 727 and 1004.

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[10] The Board states in its interpretation of the revised regulation that the definition of "cardholder" involves no change in meaning from the old regulation. The relevant paragraph states in its entirety:

> This definition differs in structure, but not in scope, from § 226.2(m) of the current regulation. The current regulation provides that a "cardholder" means any person to whom a credit card is issued for any purpose. Because of limitations set forth elsewhere in the act and regulation, however, general coverage is in fact restricted to natural persons who are issued

The rulings of the Federal Reserve Board Staff contained in the interpretive letters, and sustained in revised Regulation Z, are not demonstrably irrational. Under the rule of *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980), discussed in Petitioner's brief at 14-15, these rulings are dispositive.

CONCLUSION

For the reasons set forth above and in Petitioner's main brief, the judgment of the Court of Appeals should be reversed, and the judgment of the District Court reinstated.

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April 10, 1981

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the cards for consumer credit purposes. Other persons to whom cards are issued and cards issued for non-consumer credit purposes are covered only by the provisions regarding credit card issuance and liability. The revised definition reflects this distinction, as did the December proposal, and makes clear that a natural person guaranteeing a business credit card is not a cardholder except for the limited purposes of § 226.12(a) and (b).

46 Fed. Reg. 20850 (April 7, 1981).